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Supreme Court, U.S.
FILED

No. 091319 MAR 31 2010

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

HINKLE OIL & GAS, INCORPORATED, AN OKLAHOMA CORPORATION, PETITIONER,

v.

BOWLES RICE MCDAVID GRAFF & LOVE, LLP, A WEST VIRGINIA LIMITED LIABILITY PARTNERSHIP; CHARLES B. DOLLISON; JULIA A. CHINCHECK; DOES 1 - 100; MARC MONTELEONE; GERARD STOWERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fourth Circuit affirmed the district court's decision granting summary judgment to Respondents on the sole ground that there was no conceivable reasonable way in which Petitioner could prove that Respondents' admittedly wrongful acts caused damage to the Petitioner.

The single question presented is:

> Are there questions of fact on the issue of causation that preclude the granting of summary judgment in favor of the Respondents? The concomitant sub-question is: In the absence of any objection to the contract with Elk River Energy, was the Trustee in Bankruptcy obligated to convey Buffalo's 19 Kentucky wells to Elk River Energy or, in the event of an upset bid and an auction between bidders, to the high bidder?

Rule 29.6

No party is a publicly held corporation or other publicly held entity. No party has a parent corporation. No stock of a party is owned by a publicly held corporation or other publicly held entity. There is no publicly held corporation or other publicly held entity that had a direct financial interest in the outcome of the litigation. No party is a trade association. While this case does not arise out of a bankruptcy proceeding, the result reached directly impacts United States bankruptcy law.

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OPINION BELOW

On January 5, 2010, the Court of Appeals for the Fourth Circuit affirmed the decision of the District Court, reported at 617 F. Supp. 2d 447 (W.D. Va. 2008). *See* Appendices A and B (1a-28a).

JURISDICTION

The judgment of the court of appeals was entered on January 27, 2010. This Petition is filed within 90 days of the entry of judgment. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

RELEVANT PROVISIONS INVOLVED

FRCP 56; 11 U.S.C.A. §363; FRBP 2002; FRBP 6004 – See Appendix C (29a-34a)

STATEMENT

In 1997, Petitioner HINKLE'S sister corporation, sued BUFFALO PROPERTIES, LLC. ("BUFFALO") for "jumping claims" on two Kentucky wells. In 2004, BUFFALO, which owned 293 oil and gas wells in West Virginia and 19 wells in Kentucky, filed Chapter 11 bankruptcy. HINKLE filed an adversary proceeding. On June 6, 2005, the Court converted the Chapter 11 to a Chapter 7 bankruptcy. JOHNS was appointed TRUSTEE. His law partner was appointed TRUSTEE'S ATTORNEY.

From June – October, 2005, the TRUSTEE solicited offers to purchase BUFFALO'S assets. None were received. The TRUSTEE and HINKLE

commenced negotiations. In February, 2006, HINKLE and the TRUSTEE agreed in principle that HINKLE would buy BUFFALO'S Kentucky wells for $400,000 and would dismiss its sister corporation's court actions. *At that time, no other prospective bidders were considering any of BUFFALO'S properties.* The TRUSTEE wrote a proposed written agreement and submitted it to HINKLE.

On March 15, 2006, HINKLE contacted BOWLES-RICE ("BOWLES"), a West Virginia law firm, interviewed CHINCHECK, a partner, and retained BOWLES to finalize HINKLE'S purchase of the Kentucky wells before the Bankruptcy Court. CHINCHECK circulated a written conflict memorandum to all BOWLES attorneys, explicitly mentioning HINKLE and BUFFALO. No one at BOWLES noted a conflict. HINKLE paid BOWLES a retainer. Since the underlying terms of the HINKLE-BUFFALO agreement had already been agreed to, HINKLE had an objectively reasonable expectation of economic relations with BUFFALO through BUFFALO'S TRUSTEE.

On May 4, 2006, more than two months after the TRUSTEE had sent his proposed written contract to HINKLE, CHINCHECK submitted a proposed contract to the TRUSTEE. Because of the delay, the TRUSTEE was losing confidence that HINKLE was serious about going ahead with the agreement.

On May 11, 2006, DOLLISON and MONTELEONE, two BOWLES partners, and PRUDNICK, a friend and BOWLES client, formed ELK RIVER ENERGY, LLC ("ELK RIVER") for the

specific purpose of bidding on the same 19 wells which were the subject of the HINKLE-BUFFALO agreement. These BOWLES partners owned 2/3 of the equity in ELK RIVER.

During the first conversation between DOLLISON and the TRUSTEE'S ATTORNEY, the TRUSTEE'S ATTORNEY asked DOLLISON, "Do you understand that your law partner JULIA CHINCHECK is representing an entity that is also looking at this?" DOLLISON responded that he was aware of that. He replied, "Look, I'm not doing this as a lawyer. This is my personal business. You don't need to worry about that." Neither DOLLISON nor MONTELEONE ever advised anyone at BOWLES, or HINKLE, that they were equity owners of an entity which was directly interfering with HINKLE'S expectation that a contract would be signed. Neither DOLLISON nor MONTELEONE sent out a conflict check.

By May 22, 2006, the TRUSTEE had not signed a written agreement with anyone concerning BUFFALO's 19 Kentucky wells. The TRUSTEE'S ATTORNEY and CHINCHECK agreed to meet on May 25, 2006 to finalize the language of the agreement between HINKLE and the TRUSTEE.

Prior to May 23, 2006, BUFFALO'S TRUSTEE had entered into a written contract with a third party to sell BUFFALO'S *West Virginia* wells for $400,000. Two of BUFFALO'S secured creditors file an objection to this agreement and bid their $1,900,000 security to purchase BUFFALO'S *West Virginia* wells.

On May 23, 2006, ELK RIVER offered the TRUSTEE $450,000 for the same 19 *Kentucky* wells HINKLE expected to purchase. The TRUSTEE accepted this offer. ELK RIVER and the TRUSTEE entered into a written agreement for the sale of the wells. On May 25, 2006, BUFFALO'S TRUSTEE filed a Notice of Trustee's Sale in the bankruptcy court to sell BUFFALO'S 19 Kentucky wells to ELK RIVER. The Notice stated:

> "**You are further advised and notified that objections to the Trustee's motion and the proposed sale should be filed with this Court before twenty (20) days from the date of this Notice. ... If no objections are filed with the Clerk of this Court within that time, an Order will be entered by this Court allowing the proposed sale.** (Emphasis provided).
>
> "The Trustee will also accept upset bids in the amount of $455,000.00 or more, **on the same or similar terms as the proposed purchase agreement** ... If the Trustee receives any such upset bids **for said property** within twenty (20) days of the mailing of this Notice, the Trustee will schedule a meeting and **notify all persons who have submitted such upset bids** of the date, time and place of the meeting, **at which time the Trustee will conduct an auction and will sell the property to the highest bidder without further notice to the creditors or other interested parties.**" (Emphases provided).

At the meeting on May 25, 2006, the TRUSTEE told CHINCHECK he had signed a written contract to sell the Kentucky wells to ELK RIVER.

Next day, HINKLE learned the identity of the owners of ELK RIVER. When the conflict became apparent, HINKLE suggested that BOWLES mitigate any potential harm by assigning the ELK RIVER contract to HINKLE. BOWLES' risk management partner, decided that BOWLES would cease representing HINKLE and that ELK RIVER would withdraw from its agreement with the trustee. When ELK RIVER attempted to do so, the Trustee refused ELK RIVER'S attempted withdrawal because the contract had already been proposed to the court for approval and it was too late to terminate.

On June 5, 2006, HINKLE retained new counsel, who wrote to BOWLES seeking to mitigate damages and spoke with the TRUSTEE'S ATTORNEY, who advised him that HINKLE should file and serve an "upset bid" (an offer for the 19 Kentucky wells that was higher than the contract price between BUFFALO and ELK RIVER). HINKLE must do so by June 14, 2006, the noticed cutoff date. On June 9, 2006, HINKLE filed its upset bid.

Four attorneys who had extensive experience with the bankruptcy judge in the case, unanimously agreed what happens in the sale of an asset from a bankrupt estate in this bankruptcy court:

a. The trustee and prospective purchaser sign a written agreement. The trustee gives written notice to the bankruptcy court, the debtor's creditors,

and any others who have expressed interest of the Trustee's intent to sell. Such notice must advise the addressees that any of them can object to the proposed contract or submit a higher bid (an "upset bid"). The notice sets forth a time to submit upset bids or objections. If there are neither objections nor upset bids within the time provided, the trustee can transfer title based on that notice and does not have to get the approval of the court.

b. If the trustee moves for the approval of the contract for sale and no objections or upset bids have been filed, the Bankruptcy Court will *pro forma* approve the motion in every case. The court relies on its Bankruptcy Trustee to make a motion when it is appropriate in the Trustee's business judgment. If there is no objection and no upset bid, there is nothing for the court to rule on. The Trustee may sell property of the Bankrupt Estate in the ordinary course of business without the necessity of Bankruptcy Court approval, 11 USC §363.

c. Where there has been no objection filed but upset bids have been filed, if an upset bidder is the high bidder, a like-for-like auction is conducted; the property is sold immediately after the auction to the high bidder.

On June 12, 2006, prior to ELK RIVER'S objection to its own contract, the TRUSTEE would have conducted a like-for-like auction between ELK RIVER and any upset bidders on BUFFALO'S Kentucky wells in the ordinary course of business. Since HINKLE had overbid ELK RIVER, ELK RIVER could have chosen not to bid at the auction.

On June 12, 2006, ELK RIVER objected to its own contract. ELK RIVER was the only one who filed an objection to the Kentucky contract. The ground for objection was that "HINKLE has threatened to sue ELK RIVER and its owners for alleged interference with HINKLE's agreement and/or negotiations with the Trustee." In fact, HINKLE had never threatened to sue anyone and had timely filed an upset bid.

On July 17, 2006, more than one month after ELK RIVER'S objection, *because of ELK RIVER'S objection to its own contract*, the Bankruptcy Court, at the Trustee's request, ordered the Trustee to propose "alternative sale procedures" in which the wells would be auctioned both separately and together. The court's order noted that at least two parties had expressed interest in acquiring all of BUFFALO'S assets for substantially more than the total of the highest existing bids for the West Virginia wells and the Kentucky wells, even though at that time no one had actually submitted a bid on any BUFFALO assets. The order allowed any party who had previously submitted an offer on any BUFFALO assets to withdraw from the bid process. The order "terminated" the ELK RIVER contract. HINKLE objected.

The Bankruptcy Court overruled HINKLE'S objections, finding that HINKLE had never entered into a signed, written contract with the TRUSTEE. The Court recognized that allocation of the purchase price would be "significant to HINKLE because it would end up proving claims with respect to the

Kentucky properties."[1]

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[1] COURT: **I am very concerned [that] the previous counsel they engaged to represent them, they found they had other parties in the law firm who might also have decided to bid, and if there is anything ...HINKLE believes we ought to investigate about that – ... what I intend to do is, and you can report this to HINKLE, I intend to ... get some understanding of how that occurred. At this point in time, that is the only thing ... I think is necessary, and if I found there was something else necessary, we would take action, but I think, it looks to me like HINKLE has done what they need to do and the law firm – it looks to me like they have done what they needed to do, is get out of the mix, but I do think we need to inquire and satisfy ourselves of that.** ...

COURT: **But how are you going to allocate the prices? ... That ... may be significant to HINKLE, because it would end up proving claims with respect to the Kentucky properties. It may have some significance that we can't fully appreciate as we sit here today.** (Emphasis provided.) ...

COURT: There is also an allegation ... that [HINKLE] had a deal with the Trustee that was negotiated in HINKLE's behalf by Mr. ...Dodson ... Let me ask the Trustee if you can comment about that – I don't think ... the Trustee has been under the view that you had a completely negotiated sale with anybody yet, have you?

TURNER (TRUSTEE'S ATTORNEY): ... There is a pending A.P. in this case filed by [MMGI] and that case questions the title to two leases ... BUFFALO has in Kentucky. ... [I]n discussing with Mr. Dodson ... we had ... discussions back and forth, and after some time Mr. Dodson came back and indicated that [MMGI] was willing to sell [sic] that case and buy the rest of the assets for $400,000. That was in February of 2006. At that time, we had no other offers on Kentucky and we told Mr. Dodson that ... that offer was acceptable to the Trustee for submitting to the Court and submitting it with potential upset bids, etc. ... So we put together a proposed purchase agreement for $400,000 and the terms required and sent that to Mr. Dodson. Some time passed and then

The Bankruptcy Court approved the following alternative procedures: (1) There would be a separate auction for BUFFALO'S *Kentucky* assets. (2) There would be a separate auction for BUFFALO'S *West Virginia* assets; and (3) There would then be an auction for *all* of BUFFALO'S combined assets.

HINKLE bid $500,000 (the high bid for Kentucky wells). ELK RIVER did not bid. A third party bid $2 million (the high bid for West Virginia wells). Heritage Financial Group, Inc. ("Heritage"), which had never expressed interest before, bid $7 million for the combined properties and was the overall high bidder. HINKLE objected to the sale and tried to contact Heritage after the auction, but by then Heritage, which had conveyed BUFFALO's assets to

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we heard back from Ms. Chincheck from Bowles that they had a counterproposal. [T]he counterproposal was completely different from ... the terms the Trustee was comfortable with ... We communicated that to Ms. Chincheck and we were in the process of discussing whether we would ever come to any agreement on the terms of a purchase agreement with ... HINKLE, when we obtained another binding offer that we found ... acceptable and filed a motion with the Court to sell it under the terms of the other agreement.

So ... while we informed [HINKLE] through Dodson that the Trustee would be willing to submit to the Court an offer for $400,000, we never agreed to terms ... sufficient to allow the Trustee to move the Court to accept that offer, and before we got to that point, we obtained a different offer. So ... we do not believe we had any agreement. ...

COURT: ... I don't see anything that causes me to believe that we had a binding, enforceable sale that precluded anything that is coming down here in this case."

Mountain Country Partners, was defunct. BOWLES RICE represented Mountain Country Partners after the auction was complete, performing title work on wells that formerly belonged to BUFFALO. HINKLE filed suit.

The District Court granted BOWLES' Motion for Summary Judgment on the sole ground that HINKLE could not, *as a matter of law*, prove that Respondents' acts caused HINKLE to lose the wells, but rather that HINKLE lost the wells simply because it was an unsuccessful bidder. The District Court stated,

> "HINKLE must show it was unsuccessful in obtaining the wells because of Defendants' conduct, not because a third party outbid it. To make that showing, HINKLE claims that but for Defendants' conduct, it would have finalized a bid for the Kentucky wells separately and received the bankruptcy court's pro forma approval. Alternatively, HINKLE contends that had ELK RIVER simply pursued approval of its own agreement rather than object to its own agreement, the bankruptcy court would have approved the sale as a matter of course, and ELK RIVER could have assigned its interest to HINKLE.
>
> "HINKLE theorizes that either it or ELK RIVER would have been able to purchase the Kentucky wells separately because the bankruptcy court would have made no effort to do what it in fact did: bundle the Kentucky and West Virginia wells to fulfill the bankruptcy

court's obligation to maximize the bankruptcy estate's recovery.

"The court rejects HINKLE's theory on two interrelated grounds. First, HINKLE's theory incorrectly presupposes a disengaged, or even indifferent, bankruptcy court that is little more than a bystander, incapable of independently recognizing how to maximize the bankruptcy estate's recovery. Second, it requires the fact-finder to speculate that, given a slightly different timing and sequence of events, the bankruptcy court would have done something different than what it in fact did. ... "

Appendix B, Page 18a

"[T]he court concludes that the best, and indeed only, indication of what the bankruptcy court would have done is what it in fact did: recognize that alternative sale procedures would obtain a higher price and greater overall benefit for the estate. Any other conclusion not only incorrectly assumes a disengaged or even indifferent bankruptcy court, but rests on pure speculation. The bankruptcy court was carrying out its independent judgment and obligation to promote the best sale price possible for the benefit of the estate and its creditors when it ordered the Trustee to formulate and recommend procedures to sell the Kentucky and West Virginia properties separately or together. This Court rejects HINKLE's causation argument because it discounts and undervalues that independent judgment and obligation.

> "HINKLE's theory of causation is purely speculative. The advantage of bundling the Kentucky and West Virginia properties was clear no later than July 3, 2006, when First South Investments wrote Judge Pearson expressing its interest in purchasing all of the assets for $2.5 million, an amount much greater than any combination of previous separate offers[2]."

Appendix B, Pages 19a-20a

> "On July 17, [the Bankruptcy Court] ordered the ...Trustee to propose an alternative procedure for the sale of all, or separate parts, the assets of the debtor. With those new procedures in place, HINKLE bid $500,000 for the Kentucky wells and a third party bid $7 million for the Kentucky and West Virginia wells together. In short, a third-party simply outbid HINKLE, and that should put an end to the claim that Defendants caused HINKLE's injury", 617 F.Supp. 2d 447, 451-453 (U.S.D.C. W.D., Va., 2008).

Appendix B, Page 20a

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[2] This finding is irrelevant. "First South" never made any kind of bid; and never sent any communication to the Trustee. **The "letter of interest" was never sent until three weeks after ELK RIVER had objected to its own contract. Had ELK RIVER not objected, the conveyance of title to the Kentucky wells would long ago have been completed.**

The Fourth Circuit affirmed, stating,

> "Hinkle asserts that it presented sufficient evidence to raise a factual question as to causation because it showed that had Elk River not objected to its own sale contract for the KY wells, Hinkle would have been the successful upset bidder (Page 3, Slip Opinion).

Appendix A, Page 7a

> "Although Hinkle does not have to show that Appellees' conduct 'was the sole proximate cause of the injury,' [Citation] 'a mere possibility of causation is not sufficient' to defeat summary judgment (citation omitted).

Appendix A, Page 7a

> "Hinkle argues that Elk River's objection caused it to lose in the bidding process. Its position hinges on an assertion of inevitability: had Elk River not objected, the process would have proceeded quickly to a resolution in its favor. The record, however, does not bear this out.
>
> "In this case, the bankruptcy court restructured the bidding process in a way that caused Hinkle to be unsuccessful in its bid. It is clear from the court's July 17, 2006, order that this restructuring occurred as a result of the July 7, 2006, hearing during which Buffalo's creditors for the WV wells brought to the court's attention the fact that 'at least two entities had expressed interest in acquiring all of [Buffalo's] assets ... for

> substantially more than the total of the highest existing bids.' J.A. 505. Therefore, to show that Elk River's objection caused Hinkle to lose the bid, Hinkle would have to present evidence that, absent Elk River's objection, the bankruptcy court would have authorized the trustee's sale of the KY wells to Hinkle as the upset bidder prior to July 7, 2006, and would therefore not have had occasion to place the KY sales back into play. However, Hinkle has not presented any evidence that would permit it to assert with any certainty that the bankruptcy court would have approved the sale before that date." (Page 3, Slip Opinion).

Appendix A, Pages 7a-8a

REASONS FOR GRANTING THE PETITION

The lower court erred in granting summary judgment. The Fourth Circuit erred in affirming. As of *June 14, 2006, after the Trustee's noticed cutoff date, but for the fact that ELK RIVER (and no one else) objected to ELK RIVER'S contract*, the Trustee would either have been contractually obliged to convey title to the 19 Kentucky wells to ELK RIVER, or, in the event of upset bids and an auction, to convey title to the high bidder. Because there are significant issues of fact in respect of causation, Summary Judgment was improperly granted and this matter should be allowed to proceed to the trier of fact. The lower court and the Fourth Circuit ignored 11 USC §363 and FRBP 6004.

STANDARD TO BE APPLIED BY THE SUPREME COURT

The appellate court reviews the grant of a summary judgment *de novo, Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501, 80 L.Ed.2d 502, 104 Sup.Ct. 1949 (1984); *Salve Regina College v. Russell*, 499 U.S. 225, 239-240, 113 L.Ed.2d 190, 111 S.Ct. 1217 (1991). Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, ... where it is quite clear what the truth is, and where no genuine issue remains for trial, for the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try, *Poller v. Columbia Broadcasting System, Inc.*,368 U.S. 464, 467, 7 L.Ed.2d 458, 82 Sup. Ct. 486 (1962).

A genuine issue exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. ... The judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial ... If reasonable minds could differ as to the import of the evidence, summary judgment should not be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-252, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986).

The lower court did not pass on the necessity for HINKLE to have a binding contract to assert the cause of action for intentional interference. By not addressing this point, it impliedly accepted HINKLE'S argument

that such a contract was not required under West Virginia law[3].

I. CERTIORARI SHOULD ISSUE TO RESOLVE THE ISSUE WHETHER CURRENT BANKRUPTCY LAW OR THE FORMER BANKRUPTCY LAW SHOULD GOVERN.

The District Court cited *In re Blue Coal Corp.*, 59 B.R. 157, 160 (Bkrptcy. M.D. Pa., 1986), in support of its opinion concerning whether or not the Bankruptcy Court "could have / would have / should have" conducted a formal hearing had there been upset bids but no objection. *In re Blue Coal Corp.* predates FRBP 9019, which became effective on August 1, 1987. Second, 11 U.S.C.§110(f), on which the *Blue Coal* relies, no

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[3] The law does not require that there be a written, signed contract or that the Plaintiff prove that the contract, even if it existed, would have been successfully consummated. In Virginia and in West Virginia, tortious interference with a contract or business expectancy requires proof of four elements: 1) the existence of a valid contractual relationship or business expectancy; 2) knowledge of the relationship or expectancy on the part of the interferor; 3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and 4) resultant damage to the party whose relationship or expectancy has been disrupted, *Chaves v. Johnson* (1985) 230 Va. 112, 120, 335 S.E.2d 97,102; *Rappahannock Pistol & Rifle Club, Inc. v. Bennett* (2001) 262 Va. 5, 12, 546 S.E.2d 440, 443; *Phoenix Renovation Corp. v. Rodriguez* (E.D. Va., 2006) 461 F.Supp.2d 411, 427. **The West Virginia Supreme Court of Appeals has specifically held, "The tort of interference with a business relationship does not require that the relationship be evidenced by an enforceable contract,"** *Tiernan v. Charleston Area Medical Center, Inc.* (W.Va.,1998) 203 W.Va. 135, 148-149, 506 S.E.2d 578, 591-592.

longer even exists and has not existed since 1987.[4] *Third*, *Blue Coal* relies on the relationship between the Bankruptcy Court and the Trustee which has been completely abrogated by the new Code[5]. Thus, the District Court's use of *Blue Coal* to support its opinion was plain error.

In re Telesphere Communications, Inc., 179 B.R. 544 (Bkrptcy. ND Ill., 1994) pointed out that TMT had been superseded by statute:

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[4] The statute, as it was then in effect, has been entirely overturned by the new Bankruptcy Code.

[5] The pre-Code Amendment need for the Bankruptcy Court to be involved was exemplified in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson* 390 U.S. 414, 424, 88 S.Ct. 1157, 1163 (1968), wherein it was stated, "[I]t is essential that every important determination in reorganization proceedings receive the 'informed, independent judgment' of the bankruptcy court. *National Surety Co. v. Coriell*, 289 U.S. 426, 436, 53 S.Ct. 678, 682, 77 L.Ed. 1300 (1933). ... The fact that courts do not ordinarily scrutinize the merits of compromises ... cannot affect the duty of a bankruptcy court to determine that a proposed compromise forming part of a reorganization plan is fair and equitable. ... There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.

"The requirement for court approval of settlements has an uncertain basis. There is a substantial body of authority holding that a bankruptcy judge 'must apprise himself of all facts necessary to evaluate [a] settlement and make an 'informed and independent judgment' about the settlement." (Citations). These authorities, however, appear to be grounded in pre-Code decisions which reflect the encompassing administrative role of the bankruptcy court under the Bankruptcy Act of 1898. *TMT* ..., for example, is a pre-Code decision stating that it is essential for "every important determination in reorganization proceedings" to receive the independent judgment of the bankruptcy court. 390 U.S. at 424, 88 S.Ct. at 1163.

"The Code itself rejects this view of the role of the bankruptcy court; indeed, one of the express purposes of the Code was to remove the bankruptcy judge from general estate administration, giving that task to the newly created office of United States Trustee. The House Report on the legislation that became the Bankruptcy Code states that the Code provides for a 'separation of judicial and administrative functions currently performed by the bankruptcy judges,' with the judges acting as 'passive arbiters of disputes that arise in bankruptcy cases' and the United States trustees assuming "the bankruptcy judge's current supervisory roles."

H.R.Rep. No. 595, 95th Cong., 1st Sess. 107 (1977), U.S.Code Cong. & Admin. News 1978, 5787, 6069. (Emphasis added).

> "Consistent with this legislative purpose, the Bankruptcy Code contains no requirement for judicial approval of settlements. (Citation). ... Thus, unless the Bankruptcy Code requires court approval for the underlying action that the trustee seeks to accomplish, there should be no need for court approval of a settlement that effectuates that action."

In re Telesphere Communications, Inc. 179 BR 544, 551-552 (Bnkrptcy., ND Ill., 1994). ...

> "FN8. Section 102(1)(B)(i) of the Code makes it clear that the phrase 'after notice and a hearing,' as used in Section 363(b), 'authorizes an act without an actual hearing *if such notice is given properly and if such a hearing is not requested timely by a party in interest.*' Thus, ... if an objection to the proposed action is not made, then *the trustee may proceed with the same authority as if he had obtained a court order authorizing the action.*" (Citation). – "*In re Telesphere Communications, Inc.* 179 BR 544, 552, fn. 8 (Bkrptcy. ND Ill., 1994). (Emphasis provided).

Accord, *In re Novak*, 383 B.R. 660, 667 (Bkrtcy.W.D.Mich.,2008); *In re Fortran Printing, Inc.*, 297 B.R. 89, 96 (Bkrtcy.N.D.Ohio,2003).

"**The bankruptcy court's involvement is not required when no objection is filed to the Trustee's proposed sale of property of the estate.** 11 USC § 363(b)(1) provides that '[t]he Trustee, after notice and a hearing, may ... sell ..., other than in the ordinary course of business, property of the estate.' The phrase 'after notice and a hearing' is defined in §102 of the Bankruptcy Code: (1) 'after notice and a hearing,' or a similar phrase- (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but (B) authorizes an act without an actual hearing if such notice is given properly and if such a hearing is not requested timely by a party in interest....**In the absence of an objection to a proposed sale, § 363(b)(1), read in light of § 102(1)(B)(i), permits the sale of property of the estate without court involvement.**" (Emphases provided), *In re VIII South Michigan Associates*, 167 B.R. 877, 878-879 (Bkrptcy., N.D.Ill.,1994).

The issue of fact in this case is: **In the absence of an objection by ELK RIVER to its own contract, is it more likely than not that the Trustee would have sold the wells to the high bidder on the Kentucky wells without the intervention of the Bankruptcy Judge prior to July 3, 2006, three weeks after ELK RIVER objected?**

II. CERTIORARI SHOULD ISSUE TO SETTLE DIFFERENCES AMONG THE VARIOUS DISTRICTS CONCERNING THE RESPECTIVE ROLES OF THE BANKRUPTCY COURT AND THE BANKRUPTCY TRUSTEE IN CONNECTION WITH THE SALE OF THE PROPERTY OF A BANKRUPTCY ESTATE.

In its rush to vest the Bankruptcy Court with unlimited discretion and to condemn HINKLE for viewing the Bankruptcy Court as a "disengaged or even indifferent bankruptcy court," the district court violated 11 U.S.C. §363 (Appendix C, Page 29a), FRBP Rule 6004 (Appendix C, Pages 32a-34a), and the Trustee's own notice of the sale.

Bankruptcy Courts in several states completely disagree with the lower court's holding in the instant case.

"Under 11 USC §363, Congress gave trustees broad power to sell property of an estate and provided for the safeguarding of interests other than those of the bankruptcy estate. The rule of law provided in this section clearly indicates that the manner of sale is within the discretion of the *Trustee* and that any such sale is *not* a *judicial sale*," *In re Alisa Partnership* 15 B.R. 802 (Bkrtcy.D.Del. 1981); *In re Canyon Partnership* 55 B.R. 520, 524 (Bkrtcy.Cal.,1985).

"The sale of estate property under the Bankruptcy Code is conducted by a trustee, who has

ample discretion to administer the estate, including authority to conduct public or private sales of estate property," *In re WPRV-TV, Inc.* 143 B.R. 315, 319 (D.P.R.1991), vacated on other grounds, 165 B.R. 1 (D.P.R.1992), aff'd in part, rev'd in part, 983 F.2d 336 (1st Cir.1993); *In re Canyon Partnership*, 55 B.R. 520, 524 (Bankr.S.D.Cal.1985).

"*In fact, in most situations, sales that are properly noticed and set for hearing do not even require formal judicial approval, In re Telesphere Communications, Inc.*, 179 B.R. 544, 552 & n. 8 (Bankr. N.D. Ill.1994). *It is only when there are objections that the trustee must seek approval of the proposed sale from the bankruptcy court*," *In re Bakalis* 220 BR 525, 531 (Bkrtcy. EDNY, 1998). (All emphases supplied).

In the instant case, the ELK RIVER sale was properly noticed and the TRUSTEE'S notice specifically said, "*If no objections are filed with the Clerk of this Court within [the time provided for in the notice] an Order will be entered by this Court allowing the proposed sale.*" Thus, a *discretionary* judicial approval was not even required as a matter of law.

A. SALE OF PROPERTY IN THE ORDINARY COURSE OF BUSINESS.

11 U.S.C. §363(c)(1) explicitly provides:

"*If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of*

property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing." (Emphasis provided).

Appendix C, Page 29a

Bankruptcy Courts in Minnesota, Tennessee, Texas, and Virginia have held that two tests must be satisfied for an action to be held to be in the ordinary course of business: (1) Would a creditor expect notice and a hearing on the contemplated transaction because of its unusual nature? and (2) Is the contemplated transaction ordinary for the particular type of business concerned? *Chase Manhattan Bank v. Walt Robbins, Inc. (In re Walt Robbins, Inc.)* 129 B.R. 452, 456 (Bankr.E.D. Va. 1991); *In re Media Central, Inc.* 115 B.R. 119, 123-24 (Bankr.E.D.Tenn. 1990); *Johnston v. First St. Cos. (In re Waterfront Cos.)* 56 B.R. 31, 34-35 (Bankr. D. Minn. 1985); *In re Springfield Furniture, Inc.* 145 BR 520, 536 (Bkptcy., ED Va, 1992). Where the trustee seeks, in the ordinary course of business, to sell property, there is no need to further burden the docket or the staff of the Court with a superfluous order merely to comfort the buyer, *In re HLC Properties, Inc.* 55 BR 685, 686 (Bankr. Tex. 1985).

B. SALE OF PROPERTY OTHER THAN IN THE ORDINARY COURSE OF BUSINESS.

11 USC §363(b), which applies to the sale a Bankruptcy Estate's property other than in the ordinary course of business, provides, in pertinent part:

"The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate ..." (Appendix C, Page 29a)

FRBP Rule 6004 provides, in pertinent part:

> "a) Notice of proposed use, sale, or lease of property: Notice of a proposed ... sale ...of property, other than cash collateral, not in the ordinary course of business shall be given pursuant to Rule 2002(a)(2), (c)(1), (i), and (k) and, if applicable, in accordance with § 363(b)(2) of the Code[6].

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[6] Rule 2002 provides, in pertinent part:

> (a) Twenty-day notices to parties in interest: ... [T]he the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of: ... (2) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business ...
> (c) Content of notice: (1) Subject to Rule 6004, the notice of a proposed ... sale ...of property shall include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections. The notice ... is sufficient if it generally describes the property. The notice ... shall state whether the sale is consistent with any policy prohibiting the transfer of the information. ... (i) Copies of all notices required to be mailed pursuant to this rule shall be mailed to the committees elected under § 705 or appointed under § 1102 of the Code... [T]he court may order that notices required ... be transmitted to the United States trustee and ... mailed only to the committees elected under § 705 or appointed under § 1102 of the Code ... and to the creditors and equity security holders who ... file a request that all notices be mailed to them. ...

"(b) Objection to proposal: Except as provided in subdivisions (c) and (d) of this rule, an objection to a proposed ... sale ... of property shall be filed and served not less than five days before the date set for the proposed action or within the time fixed by the court. An objection to the proposed ... sale of property is governed by Rule 9014.

"(c) Sale free and clear of liens and other interests: A motion for authority to sell property free and clear of liens or other interests shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold. The notice required by subdivision (a) of this rule shall include the date of the hearing on the motion and the time within which objections may be filed and served on the debtor in possession or trustee. ...

"(e) Hearing: **If a timely objection is made** pursuant to subdivision (b) ... of this rule, the date of the hearing thereon may be set in the notice given pursuant to subdivision (a) of this rule. (Emphasis supplied)

"(f) Conduct of sale not in the ordinary course of business:

The United States trustee shall ... receive notice of any other matter if such notice is requested by the United States trustee or ordered by the court. ...

> (1) All sales not in the ordinary course of business may be by private sale or by public auction. ... If the property is not sold by an auctioneer, the trustee ... shall file the statement and transmit a copy thereof to the United States trustee.
>
> (2) After a sale in accordance with this rule the ... trustee ... shall execute any instrument necessary or ordered by the court to effectuate the transfer to the purchaser." – FRBP Rule 6004

Appendix C, Pages 32a-34a

Bankruptcy Courts in many states have held that the Bankruptcy Judge need not become involved in the process of sale when there is no objection to such sale.

The precise issue addressed by the lower court in this case, the necessity of judicial participation in the proposed sale by the Trustee of an asset other than in the ordinary course of business was directly addressed by the Court in *In re Hanline* 8 B.R. 449, (Bkrtcy. Ohio, 1981). In that case, the Trustee sought an Order from the Bankruptcy Court approving the sale. The court stated:

> "[T]he Court finds that such an order as is requested by the Trustee is neither appropriate nor necessary under the Bankruptcy Code of 1978.

"11 U.S.C. Section 363(b) is the operative section and provides as follows: "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate."

"This section empowers the Trustee to sell property other than in the ordinary course of business thereby superseding Rule 606 Rules of Bankruptcy Procedure which called for judicial supervision of a sale by the Trustee. While a court order is not required before the Trustee sells property, the Trustee must comply with the "after notice and a hearing" provision of Section 363(b). **However, that phrase is defined in Section 102 to mean that a hearing is necessary only if there is a timely objection to the proposed sale.** (Emphasis supplied).

"[A] hearing will not be necessary in every instance. If there is no objection to the proposed action, the action may go ahead without court action. This is a significant change from present law, which requires the affirmative approval of the bankruptcy judge for almost every action. *The change will permit the bankruptcy judge to stay removed from the administration of the bankruptcy or reorganization case, and to become involved only when there is a dispute about a proposed action, that is, only when there is an objection.*"

In re Hanline 8 B.R. 449, 450 (Bkrtcy. Ohio, 1981)

The Bankruptcy Judge need not become involved when there is no objection. *In re Gabel* 61 B.R.

661, 667 (WD La., 1985); *In re Schenck Tours, Inc.* 69 B.R. 906, 916 (ED NY, 1987); *In re Burd*, 202 B.R. 590, 592 (ND Ohio, 1996); *In re Robert L. Hallanore* 40 B.R. 181, 182-183 (D. Mass., 1984); *In re Karpe* 84 B.R. 926, 930 (MD Pa., 1988); *In re Laughinghouse* 51 B.R. 869, 873 (E.D. N.C., 1985); *In re NEPSCO, Inc.* 36 B.R. 25, 26 (D. Me., 1983).

Moreover, in the context of an uncontested motion to sell free and clear, the conclusion that a trustee may conduct a sale without court approval is consistent with the legislative history of § 102, which emphasizes notice rather than actual court involvement, *Citicorp Homeowners Services, Inc. v. Elliot (In re Elliot)* 94 B.R. 343, 345-46 (E.D.Pa.1988); *Hargrave v. Township of Pemberton (In re Tabone, Inc.)* 175 B.R. 855, 858 (Bankr. D. N.J., 1994); *In re Shary* ,152 B.R. 724, 725-26 (Bankr.N.D.Ohio 1993), which all held that a creditor's failure to object to a sale after receiving proper notice constituted consent to such sale under 11 U.S.C. § 363(f)(2)), *In re Burd* 202 B.R. 590, 593 (Bkrtcy.N.D.Ohio,1996).

A stranger to the estate is without standing to object to proposed sale of debtor's assets, where no party in interest has objected, *In re NEPSCO, Inc.* 36 B.R. 25 (D.Me.1983). Court approval of a sale of property of the estate by a trustee or debtor-in-possession is not necessary in the absence of an objection unless the terms of sale require approval of the court, *In re Governor's Island, Bkrtcy.* 45 B.R. 247 (E.D.N.C.1984)

In the instant case, the District Court and the 4th Circuit chose to "begin history" on *July 17, 2006.* **In so**

doing, they ignored that the wrong had been consummated and the damage done by June 12, 2006 – more than a month earlier. The District Court ignored that but for ELK RIVER'S objection – and there were no other objections to the Kentucky contract – the sale of BUFFALO'S Kentucky assets would have gone forward.

Contrary the District Court's and the 4th Circuit's findings that there were no "reasonable" means of satisfying the causation factor "but for" the wrongful acts of the BOWLES-RICE, there are six separate reasonable factual scenarios, any of which would have satisfied the "reasonable" causation factor:

In the event of a Sale to HINKLE by the TRUSTEE:

1. On May 25, 2006, Chincheck meets with the Trustee. The difference in contract language is worked out. The Trustee and HINKLE enter into a written contract. The Trustee notices the sale and moves for approval of the sale. No one objects and there are no upset bids. On the 21st day the Trustee secures Bankruptcy Court approval and sells the wells to HINKLE.

2. Same scenario as Paragraph 1. The Trustee notices the sale and moves for approval of the sale. No one objects to the proposed sale *but there are upset bids*. The Trustee conducts a like-for-like auction on the Kentucky wells. After the auction, the Trustee secures Bankruptcy Court approval and sells the wells to the high bidder.

In the event TRUSTEE enters into Agreement for Sale with ELK RIVER, not HINKLE:

3. ELK RIVER enters into a contract with the Trustee. The Trustee notices the sale and moves for approval. No one objects and there are no upset bids. On the 21st day the Trustee secures Bankruptcy Court approval and sells the wells to ELK RIVER.

4. Same scenario as Paragraph 3. The Trustee notices the sale and moves for approval. No one objects to the proposed sale *but there are several upset bids.* The Trustee conducts a like-for-like auction on the Kentucky wells. After the auction, the Trustee secures Bankruptcy Court approval and sells the wells to the high bidder.

5. Same scenario as paragraph 3. The Trustee notices the sale and moves for approval. ELK RIVER assigns the contract to HINKLE. No one objects and there are no upset bids. On the 21st day the Trustee secures Bankruptcy Court approval and sells the wells to HINKLE as assignee of ELK RIVER.

6. Same scenario as paragraph 3. The Trustee notices the sale and moves for approval. ELK RIVER assigns its contract to HINKLE. No one objects to the proposed sale *but there are several upset bids.* The Trustee conducts a like-for-like auction on the Kentucky wells, 11 USC §363. After the auction, the Trustee secures Bankruptcy Court approval and sells the wells to the high bidder.

These scenarios are not only "reasonable," but they are the most likely to occur. **Since absolutely no one but ELK RIVER objected to the Trustee-ELK RIVER contract prior to the cut-off date, June 14, 2006, it is rank speculation that someone else "might have" objected to the Trustee-ELK RIVER contract or "expressed interest" in making a higher bid at a later date.** Since the "alternative bid procedure" was never even proposed until *more than a month after ELK RIVER objected to its own contract, the sole cause of the alternative bid proposal was ELK RIVER's objection to its own contract.* (Emphasis supplied).

III. ABSENT ELK RIVER'S OBJECTION, THE TRUSTEE WAS CONTRACTUALLY BOUND TO CONVEY TITLE TO THE KENTUCKY WELLS TO ELK RIVER OR THE HIGH BIDDER.

While the lower courts concluded that HINKLE never entered into a signed, executed written contract with the Trustee, this finding is irrelevant since it ignores that there *was* a binding contract between the Trustee and *ELK RIVER*. The Trustee gave notice of precisely what would happen in two anticipated scenarios: (1) If no one objected to the contract, the court **would** approve the sale, and (2) If there were "upset bids." and an auction, the TRUSTEE **would** sell and convey the 19 Kentucky wells to the high bidder *without further notice or hearing*. (Emphasis supplied).

> "[A contract is] ... a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the

> other. (Citation) ... [T]he ingredients requisite to form a contract, are, parties, consent, and an obligation to be created or dissolved: these must all concur, because the regular effect of all contracts is, on one side, to acquire, and on the other, to part with, some property or rights; or to abridge, or to restrain natural liberty, by binding the parties to do, or restraining them from doing, something which before they might have done, or omitted. ... [A] contract is either executory or executed; by the former, a party binds himself to do, or not to do, a particular thing; ... but whether executed or executory, they both contain obligations binding on the parties, and both are equally within the provisions of the constitution of the United States, which forbids the state governments to pass laws impairing the obligation of contracts,"

Trustees of Dartmouth College v. Woodward 17 U.S. 518, 656-657, 4 L. Ed. 629 (1819).

The construction to be put upon contracts depends upon the intention of the parties, to be gathered from the language of the individual instrument. All contracts ought to be construed according to their plain meaning... The questions [raised are] to be determined by the intention and meaning of the parties, as [they] appear on the instrument, and by the application of common sense, to each particular case ... *Lowber v. Bangs*, 69 U.S. 728,736, 17 L.Ed. 768 (1864). It is the province of courts to enforce contracts, not to make or modify them,*The Harrington*, 76 U.S. 161, 173, 19 L.Ed. 629 (1869);

Carnegie Steel Co. v. United States, 240 U.S. 156, 164, 60 L.Ed. 576, 36 Sup. Ct. 342 (1916).

In the instant case, the intent of the Trustee and ELK RIVER was that absent certain conditions, e.g. an objection to the contract or an overbid which would lead to an auction, after which title would be conveyed to the high bidder, the Trustee would sell and ELK RIVER would buy the 19 Kentucky Wells.

IV. THERE CAN BE MORE THAN ONE CAUSE OF DAMAGES. ALL THE LAW REQUIRES IS THAT DEFENDANTS' ACT BE *A* CAUSE OF DAMAGES. PROXIMATE CAUSE IS A QUESTION OF FACT TO BE DETERMINED BY THE TRIER OF FACT.

"There can be more than one cause of damages. If an injury be caused by the concurring negligence of the defendant and a third person, the defendant is liable to the same extent as though it had been caused by his negligence alone, (Citations) " *Miller v. Union Pac. R. Co.*, 290 U.S. 227, 236-237, 54 Sup. Ct. 172, 78 L.Ed. 285 (1933).

In its Memorandum Opinion, the District Court said,

> "[HINKLE's theory] requires the fact-finder to speculate that, given a slightly different timing and sequence of events, the bankruptcy court would have done something different than what it in fact did. ... In short, a third-party simply outbid HINKLE and that should put an end to the claim that Defendants caused HINKLE's injury."

Appendix B, Page 18a; 20a

In so ruling, the lower court pre-empted the finder of fact by claiming the jury would have to "speculate." But here, in light of 11 USC §363, FRBP 6004, and the Trustee's notice of sale, there is no need for the jury to speculate on *anything*. The Trustee said what *was going to happen* – not what "might" or "could" or "should" happen; this was in strict accordance with 11 USC §363 and FRBP 6004. The jury can certainly find, without the need of speculation, that had CHINCHECK done her job promptly, the issues between the Trustee and HINKLE could have been resolved within a week, and by April 15, 2006, long before BUFFALO'S Trustee lost faith in HINKLE, a contract would have been signed and the motion for approval filed – more than a month prior to BUFFALO seeking alternate suitors and more than a month before ELK RIVER "stole" HINKLE'S expectancy.

The chances that HINKLE would have objected to its own contract were nil. Whether anyone would have filed an upset bid *might* call for speculation. Would anyone else have objected to the contract? Perhaps. *But here the actual history and facts clearly demonstrate that no one except ELK RIVER objected to its own contract.* (Emphasis provided).

The lower court's opinion that HINKLE'S arguments "require the fact-finder to speculate that, given a slightly different timing and sequence of events, the bankruptcy court would have done something different than what it in fact did," flies in the face of established statute, rule, and precedent. Heritage, the

successful $7,000,000 bidder, was not even in existence at the time of the ELK RIVER contract. It was not on the Trustee's mailing list; it was a stranger to the bankruptcy and had no standing to bid, *In re NEPSCO, Inc.* 36 B.R. 25 (D.Me.1983); and Heritage disappeared within moments of its successful bid; and, "coincidentally" had "sold" its interest to a company that "just so happened" to be yet another BOWLES RICE client. The jury is allowed to draw any reasonable inference it wants from the evidence presented. That is precisely why it is a jury question of what most likely would have happened. But by its Order granting Summary Judgment, the lower courts arrogated to themselves the duties of the trier of fact. They went beyond determining *whether* there were triable issues of fact; they simply determined the issues of fact on their own.

The term, "proximate cause," is often difficult of exact definition as applied to the facts of a particular case. However, where an original act is wrongful and in a natural and continuous sequence produces a result which would not have taken place without the act, proximate cause is established, and the fact that some other act unites with the original act to cause injury does not relieve the initial offender from liability (Citation)... [W]here there is a question upon which reasonable minds might differ ... the question is one for submission to the jury under proper instructions as to proximate cause, *Aetna Casualty & Surety Co. v. Leahey Constr. Co.*, 219 F.3d 519, 543 (CA 6th, Ohio, 2000).

Issues of negligence and proximate causation ordinarily are questions of fact for the jury's

determination, A court decides these issues **only when reasonable persons could not differ**, *Hadeed v. Medic-24, Ltd.*, 237 Va. 277, 285, 377 S.E.2d 589, 593 (1989).[7] (Emphasis supplied).

What is the proximate cause of an injury is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it, *Milwaukee & St. P.R. Co. v. Kellogg* 94 U.S. 469, 474-475, 24 L.Ed. 256, (1876).

Since there were no objections to the ELK RIVER contract *except ELK RIVER's own objection*, there is *no* likelihood that anyone else would have objected. Had there been upset bids, this would have set the stage for an auction between competing bidders, *like for like*, **on the Kentucky assets, not on the combined assets.** The Trustee never petitioned for alternative sale procedures until *after* ELK RIVER filed an objection to its contract with the Trustee. If no

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[7] Federal courts have so ruled in numerous states, *e.g.*, *Walker v. Blitz-USA, Inc.*, 663 F.Supp.2d 1344, 1363 (N.D. Ga., 2009); *Wisconsin Mut. Ins. Co. v. U.S.*, 441 F.3rd 502, 505 (CA 7th, Wis., 2006); *Toll Bros. v. Drywit Systems, Inc.*, 432 F. 3rd 564, 5689 (CA 4th, North Carolina, 2005); *Catipovic v. Peoples Community Health Clinic, Inc.*, 401 F.2d 952, 957 (CA 8th, Iowa, 2005); *Aetna Cas. & Surety Co. v. Leahey Constr. Co.*, 219 F.3d 519, 543 (CA 6th, Ohio, 2000); *F.D.I.C. v. Refco Group*, 989 F.Supp. 1052, 1068 (D. Colo,, 1997); *Neece v. I.R.S.*, 96 F.3d 460, 464 (CA 10th, OK, 1996); *Maldonado v. National Acme Co.*, 73 F.3d 642, 647-648 (CA 6th, Michigan, 1996); *H. Enterprises Intl. v. General Electric Capital Corp.*, 833 F.Supp. 1405, 1428 (D. Minn., 1993); *Yazzie v. Sullivent*, 561 F.2d 183, 187 (CA 10th, 1977); *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 199 (CA 9th, CA, 1973).

objection is timely filed after notice has been properly given, there need not be an actual hearing, Advisory Committee Note to Fed. R. Bankr. P. 2002; 11 U.S.C.A. § 102(1)(B)(i).

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted

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No. 08-2275

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HINKLE OIL & GAS, INCORPORATED, an Oklahoma Corporation,
Plaintiff - Appellant,

v.

BOWLES RICE MCDAVID GRAFF & LOVE, LLP, a West Virginia Limited Liability Partnership; CHARLES B. DOLLISON; JULIA A. CHINCHECK; DOES 1 - 100; MARC MONTELEONE; GERARD STOWERS,
Defendants - Appellees.

October 29, 2009, Argued
January 5, 2010, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. (7:07-cv-00487-sgw-mfu).

COUNSEL: ARGUED: Hugo Nathan Gerstl, HUGO N. GERSTL, INC., Monterey, California, for Appellant.

William Delaney Bayliss, WILLIAMS MULLEN, Richmond, Virginia, for Appellees.

ON BRIEF: Brendan D. O'Toole, WILLIAMS MULLEN, Richmond, Virginia, for Appellees.

Before NIEMEYER and DUNCAN, Circuit Judges, and Benson E. LEGG, United States District Judge for the District of Maryland, sitting by designation.

PER CURIAM:

Hinkle Oil & Gas, Inc. ("Hinkle") challenges the district court's grant of summary judgment in favor of the law firm Bowles Rice McDavid Graff & Love, LLP ("Bowles Rice"), and individual partners Charles Dollison, Marc Monteleone, Julia Chincheck, and Gerard Stowers on Hinkle's claims for intentional interference with economic advantage, breach of fiduciary duty, and legal malpractice. For the reasons set forth below, we affirm.

I.

A.

Appellant Hinkle, an oil and gas well development company, had a sister corporation named Minerals Management Group, Inc. ("MMGI"). In 1997, MMGI sued Buffalo Properties, LLC ("Buffalo") over the leasing rights to two oil and gas wells in Kentucky. The litigation continued into 2004, at which point Buffalo sought Chapter 11 bankruptcy protection.

On June 6, 2005, the bankruptcy matter became a Chapter 7 proceeding. Buffalo's eligible assets were transferred to its bankruptcy estate. The assets included 19 wells in Kentucky ("KY wells") and 274 wells in West Virginia ("WV wells"). A bankruptcy

trustee was appointed to liquidate Buffalo's assets and pay off creditors.

In early spring 2006, the trustee negotiated a plan under which Hinkle would buy the KY wells for $ 400,000 and would drop MMGI's lawsuit against Buffalo. On March 1, 2006, the trustee faxed Hinkle a proposed contract for the KY wells reflecting the $ 400,000 price. Hinkle then hired attorney Julia Chincheck of the Bowles Rice law firm to complete the negotiations and obtain approval from the bankruptcy court. Although Chincheck notified her partners about this matter, none reported a conflict relating to Hinkle or Buffalo. Hinkle paid a $ 5,000 retainer and Chincheck began representation.

On May 3, 2006, the trustee moved for the bankruptcy court to approve a proposed contract to sell the WV wells to Applied Mechanics Corporation ("AMC") for $ 400,000. On May 23, 2006, two of Buffalo's creditors, Mervil Perry and the Estate of Bobby Gillispie ("Gillispie"), filed separate objections to the proposed sale.

That same day, the bankruptcy trustee agreed to sell the KY wells to Elk River Energy, LLC ("Elk River") for $ 450,000, abandoning the tentative plan to sell to Hinkle for $ 400,000. On May 25, 2006, the trustee moved for the bankruptcy court to approve this sale.

Elk River had been recently organized by two Bowles Rice partners, Charles Dollison and Marc Monteleone, and a friend of theirs. It is unknown whether any Bowles Rice partners knew of the potential conflict between Elk River and Hinkle when Chincheck opened

the Hinkle file.[1] Bowles Rice became aware of the conflict at least by early May when the trustee informed Dollison that his law partner, Chincheck, was representing Hinkle. According to the district court's opinion, Dollison assured the trustee, "Don't worry, I'll take care of it." J.A. 736.

Bowles Rice did not, however, resolve the conflict or even inform Hinkle that its partners were involved with Elk River. Hinkle only learned of the conflict through its own independent investigation. At a meeting on May 25, 2006, the trustee told Hinkle that Buffalo had entered into a written contract to sell the Kentucky wells to Elk River. This information prompted Hinkle to investigate Elk River, and the inquiry unearthed the involvement of the Bowles Rice partners. Hinkle then confronted Bowles Rice, demanding that Elk River mitigate the harm to Hinkle by assigning its contract to Hinkle and paying Hinkle the $ 50,000 difference. Bowles Rice rejected this demand. Hinkle never requested that Bowles Rice return its retainer fee, and the firm never did.

Dollison and Monteleone then met with Gerard Stowers, who oversaw risk management for Bowles Rice. Based on the group's decision, Bowles Rice stopped representing Hinkle, and Elk River requested that the trustee withdraw his May 25, 2006, motion for court approval of the sale. The trustee rejected that request.

The proposed contract of sale to Elk River allowed for "upset bids," namely, higher bids by outside parties that would trigger an auction to the highest bidder. The sales contract stated, "The sale . . . allows . . . upset bids

in an amount of $ 455,000[] or more . . . provided such upset bid is accompanied by an earnest money deposit of $ 25,000 in immediately available funds." J.A. 430. On June 9, 2006, Hinkle submitted to the trustee and the bankruptcy court a $ 455,000 upset bid with the required $ 25,000 earnest money. The upset bid included a proposed purchase agreement that, by its own terms, was subject to the approval of the court. On June 12, 2006, Elk River filed an objection to the trustee's May 25, 2006, motion for approval of its own sales contract, explaining that Hinkle had threatened litigation.

On July 3, 2006, the bankruptcy court received a letter of intent from First South Investments offering to purchase all of Buffalo's assets for $ 2,500,000. On July 7, 2006, before taking any action on the proposed sale of the KY wells to Elk River, the court held a hearing on the trustee's May 3, 2006, motion to approve the sale of the WV wells to AMC. The trustee, Perry, and Gillispie were represented at the hearing. Energy One Group, Inc. ("EOG"), who had submitted an upset bid in that sale, and James Clowser, who was a member of Buffalo, were also represented. At the hearing, the creditors and Clowser informed the court that "at least two entities had expressed interest in acquiring all of the assets of the Debtor for substantially more than the total of the highest existing bids for the West Virginia Oil and Gas Asset and the Kentucky Oil and Gas Asset of the Debtor." J.A. 505.

On July 17, 2006, the court decided the motion. In its order, the court noted the mention of the higher offers. The court sustained the creditors' objection to the WV wells sale and ordered the trustee to propose new sale

procedures that would permit credit bidding, allow prospective buyers to make one bid for the KY wells and WV wells combined, and provide for an auction to choose among multiple qualifying bids. The trustee soon proposed new procedures, which the court approved over Hinkle's objection.

The trustee eventually auctioned off Buffalo's assets under the new procedures. Hinkle made the highest bid for the KY wells at $ 500,000. But the overall highest bidder was Heritage Financial Group, Inc. ("Heritage"), which offered $ 7,000,000 for all of Buffalo's assets. Elk River did not bid at all. After making the purchase, Heritage transferred Buffalo's assets to Mountain County Partners ("MCP") and dissolved.

B.

After losing the auction, Hinkle brought this action against Appellees Bowles Rice, Dollison, Monteleone, Chincheck, and Stowers. The amended complaint alleged intentional interference with economic advantage (Count 1), breach of fiduciary duty (Count 2), conversion or misappropriation of property (Count 3), and legal malpractice (Count 7).[2]

Hinkle and Appellees filed cross-motions for summary judgment. On September 17, 2008, the district court awarded summary judgment to Appellees. The court found that Counts 1, 2, and 7 failed because Hinkle was unable to prove that Appellees caused it not to obtain the KY wells. The court also said Count 3 failed because Hinkle never demanded the $ 5,000 retainer, which remained in Bowles Rice's client trust account. Hinkle was given ten days to file an amended complaint

asserting claims that did not require proof of causation. On September 18, 2008, Hinkle filed a motion for reconsideration, which the court denied. On September 19, 2008, Hinkle filed another amended complaint. The court dismissed the amended complaint on October 28, 2008, finding that all the claims raised therein required proof of causation. This appeal followed.

II.

Hinkle challenges the district court's grant of summary judgment, asserting error in its conclusion that Hinkle failed to produce sufficient evidence of causation for Counts 1, 2, and 7.[3] Hinkle asserts that it presented sufficient evidence to raise a factual question as to causation because it showed that, had Elk River not objected to its own sale contract for the KY wells, Hinkle would have been the successful upset bidder.[4]

We review de novo a grant of summary judgment. *Smith v. Ozmint*, 578 F.3d 246, 250 (4th Cir. 2009). Summary judgment is appropriate if "the pleadings, the discovery and disclosure materials, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). We construe the evidence in the light most favorable to Hinkle and draw all reasonable inferences in its favor. *See Smith*, 578 F.3d at 250. Although Hinkle does not have to show that Appellees' conduct "was the sole proximate cause of the injury," *Spencer*, 618 S.E.2d at 455-56 (emphasis omitted), "a mere possibility of causation is not sufficient" to defeat summary judgment, *id.* at 456 (citation and quotations omitted).

Hinkle argues that Elk River's objection caused it to

lose in the bidding process. Its position hinges on an assertion of inevitability: had Elk River not objected, the process would have proceeded quickly to a resolution in its favor. The record, however, does not bear this out.

In this case, the bankruptcy court restructured the bidding process in a way that caused Hinkle to be unsuccessful in its bid. It is clear from the court's July 17, 2006, order that this restructuring occurred as a result of the July 7, 2006, hearing during which Buffalo's creditors for the WV wells brought to the court's attention the fact that "at least two entities had expressed interest in acquiring all of [Buffalo's] assets . . . for substantially more than the total of the highest existing bids." J.A. 505. Therefore, to show that Elk River's objection caused Hinkle to lose the bid, Hinkle would have to present evidence that, absent Elk River's objection, the bankruptcy court would have authorized the trustee's sale of the KY wells to Hinkle as the upset bidder prior to July 7, 2006, and would therefore not have had occasion to place the KY sales back into play. However, Hinkle has not presented any evidence that would permit it to assert with any certainty that the bankruptcy court would have approved the sale before that date.

Hinkle's upset bid documents clearly indicate that the proposed sales agreement between the trustee and Hinkle was subject to the bankruptcy court's approval.[5] Hinkle argues, however, that the court would have approved the sale "pro forma" shortly after Hinkle's upset bid. This assumption contradicts the trustee's testimony that "there is always a chance" that the court might reject the sale. J.A. 266. In fact, in his deposition,

the trustee agreed that "it would be speculation to guess whether [the sale] would [have] be[en] approved" by the bankruptcy court. J.A. 262. Hinkle's assumption also ignores the fact that, on July 3, 2006, the court received a letter of intent from First South Investments offering $ 2,500,000 for all of Buffalo's assets. It would be mere speculation to assume that the court would have ignored that offer and approved the Hinkle sale. Furthermore, Hinkle's assumption that the court would have taken a purely passive role in approving the sale is contradicted by the court's proactive involvement in directing the trustee to restructure the bidding process in order to create the potential for higher returns for Buffalo's creditors.

Even assuming that the bankruptcy court would have approved the sale, Hinkle has presented no evidence to support the inference that the approval would have occurred before the July 7, 2006, hearing that led to the bidding restructuring. Hinkle merely speculates that the "pro forma" approval of the court would have occurred in approximately one day. Hinkle cannot "create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985); *see also Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 308 (4th Cir. 2006) ("Mere unsupported speculation is not sufficient to defeat a summary judgment motion if the undisputed evidence indicates that the other party should win as a matter of law.")

Hinkle's unsupported assertion that, but for Elk River's objection, the bankruptcy court would have approved the upset bid before having an opportunity to

restructure the bidding process is not sufficient to defeat Appellees' summary judgment motion.

III.

Accordingly, for the reasons stated above, we

AFFIRM.

Footnotes

[1]Bowles Rice concedes that a conflict exists for purposes of this case.\

[2]Hinkle abandoned Counts 4-6 of its original complaint.

[3]Hinkle does not challenge and thus waives objection to the district court's grant of summary judgment on Count 3.

[4]Hinkle concedes that its intentional interference with economic advantage, breach of fiduciary duty, and legal malpractice claims all require proof that Appellees' conduct was the proximate cause of Hinkle's failure to obtain the KY wells. West Virginia law defines proximate cause to mean "that cause which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the wrong would not have occurred." *Spencer v. McClure*, 217 W. Va. 442, 618 S.E.2d 451, 455 (W. Va. 2005) (citation and internal quotations omitted).

[5]Although Hinkle argues that the bankruptcy court's approval was not legally required, the evidence in the record strongly supports the inference that the trustee

would not have acted without the court's approval. The trustee filed a motion with the court requesting its approval to complete the Elk River sale. Also, both Elk River's sale contract and Hinkle's upset bid expressly provided that any sale of the property was "subject to [the] approval of the Bankruptcy Court." J.A. 413, 454. Therefore, whether or not the approval was legally required, there is absolutely no support for the assumption that the trustee would have reversed course and attempted to finalize the Hinkle sale without the court's approval.

Civil Action No.: 7:07cv00487
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA,
ROANOKE DIVISION

HINKLE OIL & GAS, INC.,
Plaintiff

v.

BOWLES RICE MCDAVID GRAFF & LOVE LLP,
JULIA CHINCHECK, CHARLES DOLLISON,
MARC MONTELEONE, AND GERARD STOWERS,
Defendants.

September 17, 2008, Decided
September 17, 2008, Filed

Samuel G. Wilson, UNITED STATES DISTRICT JUDGE.

MEMORANDUM OPINION

By: Samuel G. Wilson

United States District Judge

This is a diversity action for tortious interference, legal malpractice, breach of fiduciary duty, and conversion by Plaintiff, Hinkle Oil & Gas, Inc. ("Hinkle"), against Defendants Bowles Rice McDavid Graff & Love LLP ("Bowles Rice"), a West Virginia law firm partnership, and against four members of that firm individually, Julia Chincheck, Charles Dollison, Marc Monteleone, and Gerald Stowers. [1] Hinkle retained Bowles Rice to represent it in the acquisition of a bankrupt debtor's oil

and gas wells in Kentucky. Hinkle maintains, and the record is clear, that two of the individual Defendants, Dollison and Monteleone, formed a corporation to acquire the same oil and gas wells that Hinkle was attempting to acquire. The record is equally clear that Dollison and Monteleone ceased their efforts to obtain the wells and that ultimately a third-party simply outbid Hinkle and acquired them. The matter is currently before the court on cross- motions for summary judgment. The court concludes that Hinkle cannot show it was unable to acquire the wells because of anything Dollison and Monteleone did or failed to do, an essential element of Hinkle's tortious interference, breach of fiduciary duty, and legal malpractice claims. The court also concludes that Hinkle's evidence does not establish an actionable conversion. Accordingly, the court will grant summary judgment for Defendants. However, the court will grant Hinkle leave to assert, if it is able, any claim not predicated on its failure to obtain the Kentucky oil and gas wells.

I.

The court considers the facts in the light most favorable to Hinkle.

As early as 1997, Hinkle, an Oklahoma corporation, and its sister company, Minerals Management Group, Inc. ("MMGI"), became involved in legal disputes over two oil wells with competitor Buffalo Properties ("Buffalo"), the owner of land, oil, and gas wells in West Virginia and Kentucky. The case was in Kentucky state courts until 2004, when Buffalo filed for Chapter 11 bankruptcy protection in the United States District Court for the Southern District of West Virginia.

MMGI filed an adversary proceeding regarding the two disputed wells. The bankruptcy court converted the Chapter 11 bankruptcy to a Chapter 7 bankruptcy in 2005.

Hinkle and the trustee, Robert Johns, negotiated a plan under which Hinkle would buy Buffalo's nineteen wells in Kentucky for $ 400,000 and dismiss MMGI's state court action. The trustee agreed to move the bankruptcy court to approve the sale, once the matter was finalized. At that time, no other prospective bidders were considering the Kentucky wells as a separate purchase. The nineteen Kentucky wells represented only a portion of Buffalo's holdings, which also included 274 wells in West Virginia. The trustee had received at least one offer for all of Buffalo's holdings before the negotiations between Hinkle and the trustee.

In spring 2006, the trustee's attorney sent Hinkle a proposed contract for the sale of the Kentucky wells for $ 400,000. Hinkle contacted Julia Chincheck, a Bowles Rice partner, seeking to retain her to complete the contract negotiation and obtain bankruptcy court approval. Chincheck circulated a written conflict memorandum to all Bowles Rice attorneys, explicitly mentioning Hinkle and Buffalo. No one at Bowles Rice noted a conflict. Hinkle paid a $ 5000 retainer, and Chincheck undertook the representation.

Chincheck commenced negotiations with the trustee. Though the parties were in active negotiation, they were only discussing warranties and no contract had been signed as of May 22, 2006. The trustee had substantive disagreements with Hinkle's proposed contract, and the trustee was negotiating with at least

one other party. During a meeting on May 25, 2006, the trustee told Chincheck that Buffalo had entered into a written contract to sell the Kentucky wells for $ 450,000 to Elk River Energy, LLC ("Elk River"). Paul Soares, an agent of Hinkle, investigated the buyer and soon learned that two Bowles Rice partners, Charles Dollison and Marc Monteleone, had very recently organized Elk River and owned it along with a friend. Even before Elk River was formed, Dollison knew it was a conflict of interest to pursue the Kentucky wells while his partner, Chincheck, was working on Hinkle's behalf. When the trustee's attorney advised Dollison of the conflict, Dollison said "[d]on't worry, I'll take care of it," and continued with the sale.

When the conflict became apparent, Soares suggested that Elk River mitigate any potential harm to Hinkle by assigning its contract and paying Hinkle the $ 50,000 difference between the Elk River contract price and Hinkle's offer. Chincheck and Dollison met with Gerard Stowers, a Bowles Rice partner in charge of risk management, and decided that Bowles Rice would cease representation of Hinkle and Elk River would pull out of its agreement with the trustee.

On June 2, 2006, Chincheck advised Hinkle to find new counsel. Shortly after, Hinkle's new counsel, Hugo Gerstl, wrote to Bowles Rice seeking to mitigate damages. Bowles Rice responded by withdrawing from representation of Hinkle. Bowles Rice did not, and still has not, returned the $ 5000 retainer; it has sent Hinkle neither a bill nor an accounting.

The trustee moved the bankruptcy court to approve the Elk River contract, and set June 14 as the date for objections or upset bids. On June 9, Hinkle filed an

upset bid of $ 455,000 and sent the required $ 25,000 earnest money to the trustee. Elk River objected to its own contract. At this time, the trustee had moved the court for the approval of two sales -- one for the West Virginia wells the other for the Kentucky wells. Both proposed sales faced objections; Elk River objected to its own sale and an unrelated creditor objected to the West Virginia sale. On July 3, First South Investments wrote Judge Pearson seeking to purchase all the assets for $ 2.5 million. (Def.'s Reply Supp. Summ. J., Ex. B.)

On July 17, the bankruptcy court ordered the trustee to propose "alternative sale procedures" in which the wells would be auctioned both separately and together so that the estate could accept the highest overall bid. The court's order noted that at least two parties "had expressed interest in acquiring all of the assets of [Buffalo] for substantially more than the total of the highest existing bids for the West Virginia [wells] and the Kentucky [wells]." In re Buffalo Properties, LLC, No. 04-30404, 2006 Bankr. LEXIS 4597 (Bankr. S.D. W. Va. July 17, 2006). The order did not mention Elk River, Hinkle or Bowles Rice; its stated reasons were focused solely on selling Buffalo's wells so as to maximize recovery by permitting prospective purchasers to bid on all or specific portions of the assets. The order sustained the objection to the West Virginia sale and allowed any party that had previously submitted an offer to withdraw from the bid process. The order also "terminated in all respects" the Elk River contract. Id.

The court approved the alternative sale procedures, allowing the trustee to sell the West Virginia and Kentucky wells either separately or together. This style of auction is a common mechanism in bankruptcy

proceedings, and the trustee believed it was the best way to maximize the return to the bankruptcy estate. (Johns Dep. 137.) Hinkle objected to the alternative sale procedures, but the bankruptcy court overruled the objections.

At the auction, Hinkle bid $ 500,000, and was the high bidder for the Kentucky wells. Elk River did not bid. A third party bid $ 2 million, and was the high bidder for the West Virginia wells. An entity named Heritage Financial Group, Inc. ("Heritage") bid $ 7 million for the combined properties; it was the overall high bidder. Hinkle unsuccessfully objected to the sale of the properties to Heritage. Hinkle also tried to contact Heritage after the auction, but by then Heritage was defunct. Heritage had conveyed Buffalo's assets to an entity named Mountain Country Partners. Bowles Rice represented Mountain Country Partners after the auction was complete, performing title work on wells that formerly belonged to Buffalo.

Hinkle now brings suit against Bowles Rice and four Bowles Rice partners, Dollison, Monteleone, Chincheck, and Stowers, alleging the following claims: (1) intentional interference with business expectancy (against all Defendants except Chincheck and Stowers); (2) breach of fiduciary duty (against all Defendants except Chincheck and Stowers); (3) professional negligence (legal malpractice) (against all Defendants); and (4) conversion and/or misappropriation of proprietary property and funds (against all Defendants except Chincheck). Hinkle seeks more than $ 25 million in compensatory damages, attorney's fees, and the $ 5000 paid to Bowles Rice. [2] The matter is before the court on the parties' cross-motions for summary judgment. [3]

II.

Hinkle's tortious interference, legal malpractice and breach of fiduciary duty claims share the same element of causation: Hinkle must show it was unsuccessful in obtaining the wells because of Defendants' conduct, not because a third party outbid it. To make that showing, Hinkle claims that but for Defendants' conduct, it would have finalized a bid for the Kentucky wells separately and received the bankruptcy court's *pro forma* approval. Alternatively, Hinkle contends that had Elk River simply pursued approval of its own agreement rather than object to its own agreement, the bankruptcy court would have approved the sale as a matter of course, and Elk River could have assigned its interest to Hinkle. Hinkle theorizes that either it or Elk River would have been able to purchase the Kentucky wells separately because the bankruptcy court would have made no effort to do what in fact did: bundle the Kentucky and West Virginia wells to fulfill the bankruptcy court's obligation to maximize the bankruptcy estate's recovery. The court rejects Hinkle's theory on two interrelated grounds. First, Hinkle's theory incorrectly presupposes a disengaged, or even indifferent, bankruptcy court that is little more than a bystander, incapable of independently recognizing how to maximize the bankruptcy estate's recovery. Second, it requires the fact-finder to speculate that, given a slightly different timing and sequence of events, the bankruptcy court would have done something different than what it in fact did. Accordingly, the Court enters summary judgment for Defendants because Hinkle cannot prove Defendants' conduct caused its failure to obtain the wells.

"It is a well-established principle of bankruptcy law that the objective of bankruptcy sales and the trustee's duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate." In re Atlanta Packaging Prods., Inc., 99 B.R. 124, 131 (Bankr. N.D. Ga. 1988). To achieve this objective, sales, other than in the ordinary course of business, are subject to court approval only after notice and a hearing. See 11 U.S.C. § 363(b) (2000). To be sure, "bankruptcy courts have consistently respected the importance of the trustee's managerial functions and have abstained from any interference that would not seem indispensable for the purpose of safeguarding the interests of parties concerned." In re Blue Coal Corp., 59 B.R. 157, 160 (Bankr. M.D. Pa. 1986). But the bankruptcy court's role is far from *pro forma* or even supervisory: "the powers reserved to the courts to direct the time and manner of a sale and to confirm it or to order a resale are of such a nature that they can scarcely be termed to be 'supervisory only'. 'The bankruptcy court is in fact the vendor . . . .'" Id. (citations omitted).

With these principles in mind, the court concludes that the best, and indeed only, indication of what the bankruptcy court would have done is what it in fact did: recognize that alternative sale procedures would obtain a higher price and greater overall benefit for the estate. Any other conclusion not only incorrectly assumes a disengaged or even indifferent bankruptcy court, but rests on pure speculation. The bankruptcy court was carrying out its independent judgment and obligation to promote the best sale price possible for the benefit of the estate and its creditors when it ordered the trustee to formulate and recommend procedures to sell the

Kentucky and West Virginia properties separately or together. This Court rejects Hinkle's causation argument because it discounts and undervalues that independent judgment and obligation. [4]

Hinkle's theory of causation is also purely speculative. The advantage of bundling the Kentucky and West Virginia properties was clear no later than July 3, 2006, when First South Investments wrote Judge Pearson expressing its interest in purchasing all of the assets for $ 2.5 million, an amount much greater than any combination of previous separate offers. By July 7, the bankruptcy court had "heard presentations ... that at least two parties had expressed interest in acquiring all of the assets ... for substantially more than the total of the highest existing bids for the [assets separately] ...." In re Buffalo Properties, LLC, No. 04-30404, 2006 Bankr. LEXIS 4597 (Bankr. S.D. W. Va. July 17, 2006). On July 17, it ordered the "Chapter 7 Trustee to propose an alternative procedure for the sale of all, or separate parts, the assets of the debtor." Id. With those new procedures in place, Hinkle bid $ 500,000 for the Kentucky wells and a third party bid $ 7 million for the Kentucky and West Virginia wells together. In short, a third-party simply outbid Hinkle, and that should put an end to the claim that Defendants caused Hinkle's injury. Hinkle conflates a chain of speculation and causation when it still argues that it was engaged in negotiations before the appearance of other bidders and would have finalized an agreement with the trustee (had Elk River not submitted its own bid), that requisite notice would have been given, that no other bidders would have appeared, and that the bankruptcy court would have approved the sale. The court rejects Hinkle's speculation, and will grant summary judgment

as to Hinkle's tortious interference, legal malpractice and breach of fiduciary duty claims.

III.

Hinkle claims that Defendants (except for Chincheck) converted its $ 5000 retainer fee. This claim fails because according to the uncontradicted evidence Hinkle's retainer remains in Bowles Rice's trust account, and Hinkle has not demanded its return.

In West Virginia, conversion is any distinct act of dominion wrongfully exerted over the property of another, and in denial of his rights. Rodgers v. Rodgers, 184 W. Va. 82, 399 S.E.2d 664, 677 (W. Va. 1990); Miami Coal Co. v. Hudson, 175 W. Va. 153, 332 S.E.2d 114, 121 (W. Va. 1985). It is not necessary that the wrongdoer apply the property to his own use. Miami Coal, 332 S.E.2d at 121. Conversion may be proved in three ways: (1) by a tortious taking; (2) by any use or appropriation to the use of the defendant indicating a claim of right in opposition to the rights of the owner; or (3) by a refusal to give up the possession to the owner on demand. Shamblin's Ready Mix, Inc. v. Eaton Corp., 819 F.2d 1139 (4th Cir. 1987) (unpublished) (citing Haines v. Cochran Bros., 26 W. Va. 719, 723-24 (1885)).

Over two years have passed since Bowles Rice withdrew from representation of Hinkle. Bowles Rice, through its agreement with Hinkle, promised that any remainder of Hinkle's $ 5000 would be returned once all legal fees were paid in full. According to Defendants' brief, Bowles Rice has not billed Hinkle for services, yet still keeps the $ 5000 in a trust account. (Defs.' Reply Supp. Summ. J. 9.) The instant litigation apparently froze Bowles Rice's billing process.

Clearly, Bowles Rice's initial acceptance of the $ 5000 was not conversion; both parties voluntarily entered the transaction. Conversion could only occur at some later date, when Bowles Rice committed a distinct act of wrongful dominion. Yet no such act has occurred because Hinkle has apparently never requested the return of the money. As a result, Bowles Rice has merely left the money in the trust account. The court will, therefore, grant the defendants' motion for summary judgment as to conversion of the $ 5000 retainer fee. [5]

IV.

Hinkle also claims that Defendants converted information which they used in negotiating the Elk River contract. This claim fails because West Virginia has not recognized an action for conversion of an "unmerged" intangible property right.

Federal courts sitting in diversity must apply the governing state law, and when necessary, predict how the state's highest court would decide an unsettled issue. Horace Mann Ins. Co. v. Gen. Star Nat'l Ins. Co., 514 F.3d 327, 329 (4th Cir. 2008) (applying "generally accepted principles of insurance law" when West Virginia had not addressed a particular issue). In this case, West Virginia has not directly addressed whether it recognizes an action for conversion of intangible property. [6] The court assumes without deciding that when confronted with this issue West Virginia courts would follow the generally accepted majority approach that has allowed conversion of intangible rights merged within a document. Under this approach, Hinkle's claim for conversion of confidential and proprietary

information must fail because its information is not an intangible property right merged within a document.

As one judge on the Fourth Circuit has noted, "[t]he limitation on the tort of conversion to tangible property has been gradually relaxed so that some courts have also come to permit actions involving documents in which intangible property rights have been merged, such as with a check, a promissory note, or a stock certificate." Fed. Ins. Co. v. Smith, 63 Fed. Appx. 630, 637 (4th Cir. 2003) (Traxler, J., dissenting). Since the document "symbolizes or embodies the right to property," conversion of the document includes conversion of the intangible rights represented in the document. Id. However, this evolution "has largely stopped with the kind of intangible rights merged in or identified with a document." Id. The Restatement Second of Torts also recognizes this cause of action, [7] and a majority of jurisdictions follow this approach. [8]

Given this majority approach, the court assumes without deciding that when confronted with this issue West Virginia courts would allow an action for the conversion of intangible rights merged within a document. [9] However, even assuming this recognition, Hinkle's claim fails because it alleges conversion of "confidential and proprietary *information*," not any tangible chattel, nor any intangible right customarily merged in a document. (Am. Compl. P 86.) (emphasis added). Hinkle claims this information consisted of "secret information concerning mineral leases, production figures and projections, of and concerning Kentucky oil and gas wells in general and the 19 oil and gas wells" that Hinkle desired. Id. Hinkle claims that Bowles Rice converted this information for their own use, to inform Elk River's bid. Id. However, the

intangible property right that Hinkle alleges Bowles Rice converted is not an intangible obligation. Rather, it is information that Hinkle gathered in preparation for purchasing the Kentucky wells. This information, albeit in document form, is not an intangible property right *merged* in a document like a promissory note or a stock certificate. It is more akin to business goodwill or customer lists, property that the majority view expressly excludes from a cause of action for conversion of intangible property rights. See Restatement (Second) of Torts § 242 cmt. f (1965). Therefore, the court grants Defendants' Motion for Summary Judgment as to conversion of confidential information. [10]

VI.

For the foregoing reasons, the Defendants' Motion for Summary Judgment will be granted as to all claims. However, Hinkle may file an amended complaint within ten days asserting any claim that does not require Hinkle to prove that Defendants caused its failure to obtain the Kentucky wells. [11]

ENTER: This 17th day of September, 2008.

/s/ Samuel G. Wilson

UNITED STATES DISTRICT JUDGE

Footnotes

[1] The case was initially filed in the Western District of Oklahoma and transferred here by agreement of the parties.

[2] Hinkle originally brought several other claims, but Hinkle has abandoned them.

[3]Summary judgment is granted only "if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts are viewed in the light most favorable to the non-moving party. See Lee v. York County Sch. Div., 484 F.3d 687, 693 (4th Cir. 2007). To withstand a summary judgment motion, the non-moving party must offer evidence from which a fair-minded jury could return a verdict for the party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). This standard applies to each of the four claims at issue here.

[4] Hinkle's own conduct contradicts its *pro forma* theory of bankruptcy court approval. On June 9, 2006, Hinkle submitted an upset bid for $ 455,000. If, as Hinkle presumes, the bankruptcy court was a disinterested bystander, it would have approved that upset bid as a matter of course.

[5] However, it appears from the contract between Hinkle and Bowles Rice that Bowles Rice is obligated to return the fee to Hinkle in the absence of any bill for legal fees. As Hinkle states on brief, Hinkle is entitled to the money "under the agreement." (Pl.'s Mem. Opp'n 81.) Since Hinkle's entitlement to the retainer fee sounds in contract, not tort, this memorandum opinion and accompanying order are entered without prejudice to any contractual claim Hinkle may bring regarding Bowles Rice's obligations under the agreement.

[6] West Virginia courts have alluded to the potential for such an action, but these references only appear in the context of covenants not to compete. See Reedy v. Cmty. Health Found. of Man, 171 W. Va. 368, 298 S.E.2d 906, 912 (W. Va. 1982) (noting that "[i]nformation, or 'trade secrets,' present a high risk of unfair conversion by an employee"); see also Wood v. Acordia of W. Va., Inc., 217 W. Va. 406, 618 S.E.2d 415, 421 (W. Va. 2005) (citing Reedy for the proposition that "conversion by an employee of 'trade secrets or customer lists' are likely to injure the employer's business").

[7] Section 242 of the Restatement Second recognizes an action for the conversion of intangible property when the converter "effectively prevents the exercise of intangible rights of the kind customarily merged in a document . . . even though the document is not itself converted." Restatement (Second) of Torts § 242(2) (1965). The drafters do not precisely define "merger," but the comments reveal that the scope of this action was limited to those intangible rights traditionally embodied in a legal document that evidences those rights. Such intangible rights include "promissory notes, bonds, bills of exchange, share certificates, and warehouse receipts, whether negotiable or non-negotiable." Restatement (Second) of Torts § 242 cmt. b. Intangible rights not merged within a document include "an ordinary debt not represented by a document," business goodwill, or a customer list. Restatement (Second) of Torts § 242 cmt. f.

[8] See Courtney W. Franks, Comment, Analyzing the Urge to Merge: Conversion of Intangible Property and the Merger Doctrine in the Wake of *Kremen v. Cohen*,

42 Hous. L. Rev. 489, 518-522 (2005). Virginia is part of this majority; it recognizes conversion of intangible rights that "arise from or are merged with a document, such as a stock certificate, promissory note, or bond." United Leasing Corp. v. Thrift Ins. Corp., 247 Va. 299, 440 S.E.2d 902, 906, 10 Va. Law Rep. 1015 (Va. 1994).

[9] The court notes that West Virginia adheres to the "longstanding theory that a common law practice will remain unless supplanted by statute or later court decision." Miller v. Jeffrey, 213 W. Va. 41, 576 S.E.2d 520, 523 (W. Va. 2002).

[10] In so holding, the court is aware that some jurisdictions now only follow the majority approach "in spirit" and have relaxed the merger requirement to allow conversion of intangible property rights that are simply represented or identified in a document. See, e.g., Res. Ventures, Inc. v. Res. Mgmt. Int'l, Inc., 42 F. Supp. 2d 423, 438-39 (D. Del. 1999) (recognizing, under Delaware law, a claim for conversion of proprietary information based on "plans, technology, designs, and specifications"); Colton, McMichael, Lester, Auman, Visnovske, Inc. v. Mueller, 896 S.W.2d 741, 743 (Mo. Ct. App. 1995) (allowing a claim for conversion of engineering plans); Conant v. Karris, 520 N.E.2d 757, 165 Ill. App. 3d 783, 791-92, 117 Ill. Dec. 406 (Ill. App. Ct. 1987) (recognizing a claim for conversion of confidential information). But given West Virginia's adherence to its common law roots, the court cannot make the compound assumption that when presented with this issue West Virginia courts would not only follow the majority approach and include intangible rights within the scope of conversion, but would also relax those requirements and allow conversion for

intangible rights that are merely identified in a document. A better prediction is that when confronted with this issue, West Virginia, like Virginia, will follow the majority approach. See Fed. Ins. Co. v. Smith, 63 Fed. Appx. 630, 638 (2003) (Traxler, J., dissenting) ("[W]here the rights at issue amount to undocumented intangible property rights--those that are not merged with a document and so cannot be physically possessed--Virginia's Supreme Court has held that they cannot be validly claimed in an action for conversion.").

[1] The court expresses no opinion about whether such a claim exists.

RELEVANT PROVISIONS INVOLVED

11 U.S.C.A. §363

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless-- (A) such sale or such lease is consistent with such policy; ...

(c) (1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing. ...

Federal Rules of Bankruptcy Procedure, Rule 2002

Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee

(a) Twenty-one-day notices to parties in interest

Except as provided in subdivisions (h), (i), (*l*), (p), and (q) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by mail of: ...

(2) a proposed ... sale ... of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice; ...

(c) Content of notice

(1) Proposed ... Sale ... of Property

Subject to Rule 6004, the notice of a proposed ... sale ... of property required by subdivision (a)(2) of this rule shall include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections. The notice of a proposed use, sale, or lease of property, including real estate, is sufficient if it generally describes the property. The notice of a proposed sale ... of personally identifiable information under § 363(b)(1) of the Code shall state whether the sale is consistent with any policy prohibiting the transfer of the information. ...

(g) Addressing notices

(1) Notices required to be mailed under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case. ...

(h) Notices to creditors whose claims are filed

In a chapter 7 case, after 90 days following the first date set for the meeting of creditors under § 341 of the Code, the court may direct that all notices required by subdivision (a) of this rule be mailed only to the debtor, the trustee, all indenture trustees, creditors that hold claims for which proofs of claim have been filed, and creditors, if any, that are still permitted to file claims by reason of an extension granted pursuant to Rule 3002(c)(1) or (c)(2). ...

(i) Notices to committees

Copies of all notices required to be mailed pursuant to this rule shall be mailed to the committees elected under § 705 or appointed under § 1102 of the Code or to their authorized agents. Notwithstanding the foregoing subdivisions, the court may order that notices required by subdivision (a)(2), (3) and (6) of this rule be transmitted to the United States trustee and be mailed only to the committees elected under § 705 or appointed under § 1102 of the Code or to their authorized agents and to the creditors and equity security holders who serve on the trustee or debtor in possession and file a request that all notices be mailed to them. A committee appointed under § 1114 shall receive copies of all notices required by subdivisions (a)(1), (a)(5), (b), (f)(2), and (f)(7), and such other notices as the court may direct. ...

(k) Notices to United States trustee

Unless the case is a chapter 9 municipality case or unless the United States trustee requests otherwise, the clerk, or some other person as the court may direct, shall transmit to the United States trustee notice of the matters described in subdivisions (a)(2) ... of this rule and notice of hearings on all applications for

compensation or reimbursement of expenses. Notices to the United States trustee shall be transmitted within the time prescribed in subdivision (a) ... of this rule. The United States trustee shall also receive notice of any other matter if such notice is requested by the United States trustee or ordered by the court....

Federal Rules of Bankruptcy Procedure, Rule 6004

(a) Notice of proposed ... sale ... of property

Notice of a proposed ... sale ... of property, other than cash collateral, not in the ordinary course of business shall be given pursuant to Rule 2002(a)(2), (c)(1), (i), and (k) and, if applicable, in accordance with § 363(b)(2) of the Code.

(b) Objection to proposal

Except as provided in subdivisions (c) and (d) of this rule, an objection to a proposed use, sale, or lease of property shall be filed and served not less than seven days before the date set for the proposed action or within the time fixed by the court. An objection to the proposed ... sale ... of property is governed by Rule 9014.

(c) Sale free and clear of liens and other interests

A motion for authority to sell property free and clear of liens or other interests shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold. The notice required by subdivision (a) of this rule shall include the date of the hearing on the motion and the

time within which objections may be filed and served on the debtor in possession or trustee. ...

(e) Hearing

If a timely objection is made pursuant to subdivision (b) or (d) of this rule, the date of the hearing thereon may be set in the notice given pursuant to subdivision (a) of this rule.

(f) Conduct of sale not in the ordinary course of business

(1) Public or private sale

All sales not in the ordinary course of business may be by private sale or by public auction. Unless it is impracticable, an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot or for the property as a whole if sold in bulk shall be filed on completion of a sale. If the property is sold by an auctioneer, the auctioneer shall file the statement, transmit a copy thereof to the United States trustee,
and furnish a copy to the trustee, debtor in possession, or chapter 13 debtor. If the property is not sold by an auctioneer, the trustee, debtor in possession, or chapter 13 debtor shall file the statement and transmit a copy thereof to the United States trustee.

(2) Execution of instruments

After a sale in accordance with this rule the debtor, the trustee, or debtor in possession, as the case may be, shall execute any instrument necessary or ordered by

the court to effectuate the transfer to the purchaser. ...

FRCP Rule 56. Summary Judgment

...

(b) By a Defending Party. A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim. ...

(e) Affidavits; Further Testimony.

(1) *In General.* A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) *Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must--by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party. ...

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(2)

No. 09-1319

U.S.
JUN 1 - 2010

In The

Supreme Court of the United States

HINKLE OIL & GAS, INC.,

Petitioner,

v.

BOWLES RICE MCDAVID GRAFF & LOVE, LLP, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court and the Fourth Circuit properly awarded Respondents summary judgment because the Petitioner, Hinkle Oil & Gas, Incorporated, failed to produce sufficient evidence of causation for its state law intentional interference with economic advantage, breach of fiduciary duty and legal malpractice claims.

PARTIES TO THE CASE AND RULE 29.6 STATEMENT

Petitioner here and appellant below is Hinkle Oil & Gas, Inc. Respondents, appellees below, are Bowles Rice McDavid Graff & Love, LLP, a West Virginia Limited Liability Partnership; Charles B. Dollison; Julia A. Chincheck; Marc Monteleone; and Gerard Stowers.

No party is a publicly held entity, and no party has a parent corporation. There is no publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this case.

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is unpublished, is electronically reported at 2010 U.S. App. LEXIS 132 (4th Cir. Jan. 5, 2010) (*per curiam*), and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-11a. The opinion of the district court is comprised of two rulings: the first reported at 617 F. Supp. 2d 447 (W.D. Va. 2008), Pet. App. 12a-28a; and the second, filed on October 28, 2008, is reprinted in the Appendix to this Brief in Opposition ("Opp. App.") at 1a-2a.

COUNTER STATEMENT REGARDING RELEVANT PROVISIONS INVOLVED

The only relevant provision necessary to the disposition of this case is Federal Rule of Civil Procedure 56. Petitioner's reliance on the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure is misplaced because neither the district court nor the court of appeals relied upon any such provisions in awarding summary judgment to the Respondents.

STATEMENT OF THE CASE

Petitioner Hinkle retained Respondent Bowles Rice McDavid Graff & Love, LLP ("Bowles Rice"), a West Virginia law firm, to represent Hinkle in the acquisition of a bankrupt debtor's oil and gas wells in Kentucky ("KY wells"). (App. 357-61.) Petitioner and debtor Buffalo Properties, LLC agreed on a

$400,000 purchase price for the wells, and they anticipated that any forthcoming purchase contract would require bankruptcy court approval. However, Petitioner and the trustee could never agree to the specific terms of a purchase agreement that could be presented to the bankruptcy court for approval.

The trustee in bankruptcy ultimately reached out to Bowles Rice partner Chud Dollision to see if he was interested in purchasing the KY wells. Thereafter, Dollison and Marc Monteleone (another partner at Bowles Rice) formed Elk River Energy LLC for the purpose of purchasing the KY wells. Elk River and the trustee executed a contract for the purchase of the KY wells, (App. 413-24), and Bowles Rice concedes for purposes of this Brief in Opposition that a conflict of interest existed at that time. Recognizing the conflict, Elk River terminated its contract with the trustee. (App. 581.) Bowles Rice subsequently withdrew as counsel for Petitioner, and offered to find it suitable replacement counsel. (App. 451.)

Meanwhile, various entities expressed their continuing interest in purchasing *all* of Buffalo's assets; some even offered millions of dollars for Buffalo's oil and gas wells. Recognizing the potential inadequacy of the significantly lower offers for the debtor's individual assets, the bankruptcy court ordered auctions to be held regarding all of Buffalo's assets. (App. 507-13.) This was the best way to maximize the value of the bankruptcy estate. To be sure, the high bidder at the auction offered to pay $7,000,000 for all of Buffalo's assets, whereas Petitioner could only muster $500,000 to purchase a

portion of Buffalo's properties. Buffalo's trustee garnered $6.5 million *more* for the debtor's assets than Hinkle ever was able to offer.

Petitioner brought this diversity action against Bowles Rice and against four individual members of the law firm asserting claims for, *inter alia*: (1) tortious interference (Count 1); (2) breach of fiduciary duty (Count 2); and (3) legal malpractice (Count 7). (App. 11.)[1] Both parties moved for summary judgment. By Memorandum Opinion dated September 17, 2008, the district court granted summary judgment in favor of Bowles Rice, concluding that Petitioner failed to demonstrate a causal link between Bowles Rice's conduct and Petitioner's failure to secure the KY wells. (Pet. App. 12a-28a.) Petitioner filed a motion to reconsider, which the district court denied on October 28, 2008. (Opp. App. 1a-2a.)

On January 5, 2010, a unanimous panel of the Fourth Circuit affirmed. The court noted that under West Virginia law, each of Petitioner's claims required proof that Bowles Rice's conduct proximately caused Petitioner's injury. (Pet. App. 7a.) Because Petitioner offered nothing more than rank speculation and unfounded inferences to support its claim that it would have secured the KY wells in the absence of Bowles Rice's conduct, the appeals court affirmed the award of summary judgment to Bowles Rice. (Pet. App. 7a-11a.) Petitioner timely filed its petition for certiorari on

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[1] Hinkle abandoned Counts 3-6 either in the district court or on appeal to the Fourth Circuit. (Pet. App. 10a n.2.)

March 31, 2010, and this Court docketed the case on April 29, 2010.

STATEMENT OF FACTS

Between 1997 and 2004, Petitioner's sister company, Minerals Management Group, Inc. ("MMGI"), became involved in protracted litigation in Kentucky with competitor company Buffalo Properties ("Buffalo") regarding the leasing rights to two wells located in that state. While trial was pending in 2004, Buffalo filed for Chapter 7 bankruptcy protection in the U.S. Bankruptcy Court for the Southern District of West Virginia. See In re Buffalo Properties, LLC, Case No. 3:04-bk-30404 (S.D. W. Va. May 13, 2004). Buffalo's assets included 19 KY wells and 274 wells in West Virginia ("WV wells"). (Pet. App. 2a.) In October, 2005, Petitioner (on behalf of MMGI) initiated settlement discussions with Buffalo in hopes of resolving the underlying Kentucky state court litigation. (App. 14-15.)

In early March, 2006, Petitioner and Buffalo agreed on a tentative arrangement to resolve the Kentucky state court litigation. That "agreement" called for Petitioner to purchase the KY wells for $400,000 in exchange for the dismissal of the Kentucky lawsuit and the pending bankruptcy adversary proceeding. (App. 134, 218; Pet. App. 3a.) Buffalo's trustee conceded that he was "willing to propose" this offer to the bankruptcy court for approval "subject to getting it in writing." (App. 219.) Accordingly, the Trustee prepared and forwarded a fairly simple five-page Oil and Gas

Interests Purchase Agreement (the "Draft Purchase Agreement") to Petitioner's counsel, who then forwarded the document to Petitioner on March 1, 2006. (App. 331-32; 348-55.) The draft plainly stated on the first page that the proposed sale was "subject to approval of the Bankruptcy Court." (App. 349.)

At the time the Draft Purchase Agreement was sent to Petitioner, the trustee had received an offer from a third-party to purchase all of Buffalo's assets. (App. 232-33.) By late April, 2006, three entities other than Petitioner had expressed an interest and discussed with the trustee "the possibility of putting together an agreement on the Kentucky assets." (App. 333:24-335:6.) Clearly, Petitioner was not the only entity interested in purchasing Buffalo's assets; others were vying for the trustee's attention as well.

Petitioner retained Bowles Rice partner Julia Chincheck on April 3, 2006, in an attempt to negotiate the terms of its supposed agreement and, if approved by the bankruptcy court, to close the transaction. (App. 357-61.) Chincheck sent a conflicts check to all Bowles Rice personnel. No one at Bowles Rice advised of a conflict with Petitioner. (Pet. App. 3a.)

On May 3, 2006, the trustee moved the bankruptcy court to approve a proposed contract for sale of the WV wells to Applied Mechanics Corporation ("AMC") for $400,000. (Pet. App. 3a.) On May 23, 2006, two of Buffalo's creditors, Mervil Perry and the Estate of Bobby Gillispie ("Gillispie"),

filed separate objections to the proposed sale. (Id.) Each of the creditors objected on the ground that the proposed purchase price for the property was inadequate. (App. 363-69 ("Gillispie believes that the Sale Property's value may be significantly higher than the proposed $400,000.00 sale price and that the Proposed Sale Price may not be the highest and best price obtainable."); id. 370-72 (same for Perry objection).)

When the trustee was unable to obtain a contract with Petitioner for the purchase of the KY wells in early May 2006, he reached out to Chud Dollison, a partner at Bowles Rice, and Raymond Prudnick, a long-time friend of Dollison's, to see if they were interested in purchasing the wells. (App. 169-70.) On May 11, 2006, Prudnick, Dollison, and Marc Monteleone (another partner at Bowles Rice) formed Elk River Energy LLC for the purpose of purchasing the wells. (Pet. App. 3a.)

At the time that negotiations between Elk River and the trustee commenced, the trustee informed Dollison that Chincheck represented Petitioner. (Pet. App. 4a.) Dollison did not believe that his participation in the Buffalo bidding process presented a conflict because the trustee had informed him that Petitioner was "out of the picture" due to its failure to reach an agreement with the trustee for the purchase of the wells. (App. 174, 177.) Dollison allegedly told the trustee, "Don't worry, I'll take care of it." (Pet. App. 4a.)

On May 23, 2006, Elk River and the trustee executed a contract for the purchase of Buffalo's KY

wells for $450,000. (Pet. App. 3a.) The purchase agreement required bankruptcy approval. (App. 413.) Bowles Rice concedes for purposes of this Brief in Opposition (as it did in the district court and in the Fourth Circuit) that a conflict of interest existed when the trustee entered into the agreement with Elk River. On May 25, 2006, the trustee moved the bankruptcy court to approve the sale to Elk River. (Pet. App. 3a.)

Recognizing the conflict, Bowles Rice asked Dollison to effectuate the withdrawal of Elk River's bid for Buffalo's Kentucky assets. Accordingly, Elk River requested that the trustee withdraw his May 25 motion for court approval of the sale, but the trustee rejected this request. (Pet. App. 4a.)[2]

The proposed contract of sale to Elk River allowed for objections and "upset bids," with the trustee requiring both to be submitted by June 14, 2006. (App. 425-26.) Upset bids are higher bids submitted by outside parties that can trigger an auction to the highest bidder. (Pet. App. 4a.) The sales contract provided that upset bids could be submitted for an amount of $455,000 or more, so long as the upset bid was accompanied by an earnest money deposit of $25,000 in immediately available funds. (Pet. App. 4a-5a.) On June 9, 2006, Petitioner submitted to the trustee and the bankruptcy court a $455,000 upset bid with the required $25,000 earnest money. (App. 453-55.) The upset bid

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[2] Elk River terminated its purchase agreement with the Trustee on May 30, 2006. (App. 581.) On June 7, 2006, Bowles Rice withdrew as counsel for Petitioner, and offered to find Petitioner suitable replacement counsel. (App. 451.)

included a proposed purchase agreement that required bankruptcy court approval. (Id.) On June 12, 2006, Elk River filed an objection to the trustee's May 25 motion for approval of its own sales contract, explaining that Petitioner had threatened litigation. (Pet. App. 5a; App. 464-68.)

On July 3, First South Investments wrote the bankruptcy court seeking to purchase all of Buffalo's assets for $2,500,000. (Pet. App. 5a; App. 687.) On July 7, 2006, and before taking any action on the proposed sale of the KY wells to Elk River, the court held a hearing on the trustee's May 3, 2006, motion to approve the sale of the WV wells to AMC. The trustee, Perry, and Gillispie were present at the hearing and represented by counsel. Energy One Group, Inc. ("EOG"), who had submitted an upset bid in that sale, and James Clowser, who was a member of Buffalo, were also represented. (Pet. App. 5a.) At the hearing, the creditors and Clowser informed the court that "at least two entities had expressed interest in acquiring all of the assets of the Debtor for substantially more than the total of the highest existing bids for the West Virginia Oil and Gas Asset and the Kentucky Oil and Gas Asset of the Debtor." (Pet. App. 5a (citing App. 505).)

Possessed of this knowledge and recognizing the potential inadequacy of the significantly lower offers for Buffalo's individual assets, the bankruptcy court, on July 17, 2006, sustained the creditors' objection to the WV wells sale. The court ordered the trustee to propose "alternative asset sale procedures" in which the wells would be auctioned both separately and together so that the estate could

accept the highest overall bid. (App. 505; Pet. App. 5a.) This auction procedure is a "common mechanism" designed to maximize the amount of money the estate would receive for Buffalo's assets. (App. 257-58.)

The bankruptcy court's July 17 order never mentioned Elk River, Bowles Rice or Petitioner; instead, it focused solely on maximizing recovery by permitting prospective purchasers to bid on all or specific portions of Buffalo's assets.[3] (See App. 573 (bankruptcy order denying Hinkle's objection to the alternative sales procedure and holding that "it is in the interest of the estate and the creditors of the estate to maximize the value of the estate" and that the alternative procedure was "well-designed to accomplish that result.").)

Hinkle was present at the auction, and bid $500,000 for the KY wells. (Pet. App. 6a.) Elk River

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[3] The bankruptcy court granted Elk River's objection on August 4, 2006, and terminated Elk River's purchase agreement with the Trustee "in all respects." (App. 678.) The bankruptcy court's August 4 order noted the appropriateness of Elk River's objection: pursuant to the court's July 17 order, "any party that had previously submitted an offer was given the option of withdrawing from the bid process." (Id.) Elk River had previously terminated its agreement with the Trustee on May 30, (App. 464), but "[t]he Trustee could not withdraw its Motion [to sell the KY wells to Elk River] without an Order so Elk River filed its Objection to the Trustee's Motion. Elk River then submitted a letter to the Trustee indicating that it did not wish to participate in the bid process and requested that its earnest money be returned. The Trustee then returned Elk River's deposit." (Id.) Significantly, the August 4 order noted that Elk River's objection was "rendered moot" as a result of the July 17, 2006 bankruptcy order. (Id.)

did not bid. The overall high bidder was Heritage Financial Group, Inc., which offered $7,000,000 for *all* of Buffalo's assets. (Pet. App. 6a.) The bankruptcy court approved Heritage's offer. In re Buffalo Properties, LLC, Case No. 3:04-bk-30404 (S.D. W. Va. Sept. 18, 2006). Thus, Buffalo's trustee was able to garner $6.5 million *more* for the debtor's assets than Hinkle ever was able to offer. This lawsuit followed.

REASONS FOR DENYING THE PETITION

Review on a writ of certiorari is not a matter of right, but one of judicial discretion. See Sup. Ct. R. 10. As such, a petition for a writ of certiorari may be granted only where a petitioner demonstrates "compelling reasons" for such action. Id. Petitioner's putative reasons for granting certiorari review are all equally meritless. *First*, there is no circuit split presented by the lower courts' decisions in this case. *Second*, this case is a poor vehicle for certiorari because: (a) the opinion below is plainly correct on the merits; and (b) alternatively, even if the opinion below were incorrect (and it is not), this Court is traditionally reluctant to review the misapplication of a properly stated rule of law. In short, Petitioner presents no compelling reasons for the Court to grant the petition for certiorari. As such, the petition should be denied.

I. THERE IS NO CIRCUIT SPLIT ON THE ISSUE DECIDED BELOW, AND THE RECORD BELIES PETITIONER'S "BANKRUPTCY APPROVAL" ARGUMENT.

Petitioner claims that certiorari should issue "to settle differences among the various districts concerning the respective roles of the bankruptcy court and the bankruptcy trustee in connection with the sale of the property of a bankruptcy estate." (See Pet. 21; see also id. 16-29.) According to Petitioner, by ignoring these trial court decisions, the district court and the Fourth Circuit "violated" the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. (See id.) The crux of Petitioner's argument is that bankruptcy court approval was not statutorily required for any of the trustee's proposed sales, and that the bankruptcy court would have approved Petitioner's $455,000 upset bid "pro forma" without a notice and hearing. Petitioner is mistaken both in its argument and in its analysis.

First, Petitioner does not identify a single circuit split created by the Fourth Circuit's decision. Indeed, the lower court's ruling is not at odds with any governing Supreme Court precedent; nor is it in conflict with any other appeals courts' decisions. The petition for certiorari should be denied for this reason alone. Braxton v. United States, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law."); see also S. Ct. R. 10(a)

(Court may grant certiorari when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."). Tellingly, the Fourth Circuit did not note any awareness of the existence of a circuit split, a fact best reflected by the court's designation of the opinion as "unpublished." See 4th Cir. R. 36(a)(v) (a decision will be *published* if it, *inter alia*, "creates a conflict with a decision in another circuit."). Any circuit split argument therefore rings hollow because there is, in fact, no conflict among the lower courts.[4]

Second, Petitioner did not raise many of his "bankruptcy approval" arguments in the district court, and nothing in the Fourth Circuit's opinion suggests that the court addressed the merits of Petitioner's argument on appeal. One searches in vain in the Fourth Circuit's opinion for any mention of the Federal Rules of Bankruptcy Procedure, or of bankruptcy statutes contained in the United States Code. The issue is conspicuously absent from the court's decision because Petitioner failed to initially raise the issue with the district court. Petitioner therefore waived its right to argue, as it attempts to do in its petition to this Court, the applicability of,

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[4] Petitioner claims that the so-called "split" in authority purportedly involves "differences among the various *districts*[.]" (Pet. 21 (emphasis added).) This is not the sort of conflict for which this Court grants review: "The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision *rendered by a district court*, whether in the same circuit or in another circuit." Eugene Gressman et al., Supreme Court Practice § 4.8, at 256 (9th ed. 2007) (emphasis added).

inter alia, 11 U.S.C. § 363, Fed. R. Bankr. P. 6004, or any other bankruptcy provision. (See Pet. 21-29.) It is well-established that issues not properly raised in the district court will generally not be considered on appeal. See Singleton v. Wulff, 428 U.S. 106, 120 (1976); see also United States v. Galletti, 541 U.S. 114, 120 n.2 (2004) ("Respondents have forfeited this argument by failing to raise it in the courts below."). The rationale underlying this rule is straightforward: "We ordinarily do not decide in the first instance issues not decided below." Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 168-69 (2004) (quoting Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 109 (2001)).

To summarize, the primary thrust of Petitioner's argument is that certiorari is warranted for this Court to review the applicability of certain bankruptcy code provisions and federal bankruptcy rules. But those provisions were not properly raised and argued by Petitioner in the district court, were not addressed or analyzed on appeal by the Fourth Circuit, and have no application to the facts of this case in any event.

Third, Petitioner's argument that bankruptcy court approval was not required is belied by the evidence in the record. The record clearly demonstrates that Petitioner sought bankruptcy approval each and every time it sought to enter into an agreement with the trustee for the purchase of the KY wells. (See App. 349-55 (Draft Purchase Agreement with purchase price of $400,000 for KY wells), 453-55 (upset bid of $455,000 for KY wells).) In this regard, even assuming the Fourth Circuit

addressed the merits of Petitioner's bankruptcy approval argument, the court of appeals correctly disposed of the baseless assertion in a footnote:

> Although Hinkle argues that the bankruptcy court's approval was not legally required, the evidence in the record strongly supports the inference that the trustee would not have acted without the court's approval. The trustee filed a motion with the court requesting its approval to complete the Elk River sale. Also, both Elk River's sale contract and Hinkle's upset bid expressly provided that any sale of the property was "subject to [the] approval of the Bankruptcy Court." J.A. 413, 454. Therefore, whether or not the approval was legally required, there is absolutely no support for the assumption that the trustee would have reversed course and attempted to finalize the Hinkle sale without the court's approval.

(Pet. App. 10a-11a.) The trustee sought approval from the bankruptcy court each time he sought to sell Buffalo's assets – a fact about which Petitioner was certainly aware – and the bankruptcy court clearly played an active role in this complicated bankruptcy proceeding. Petitioner's bankruptcy approval argument is therefore barred by the "invited error" doctrine. No litigant is permitted to approbate and reprobate – here, to invite alleged error (by actively seeking bankruptcy court approval) and then by later attempting to take

advantage of the situation created by Petitioner's own wrong (by claiming in this Court that such approval is not legally required). See Shields v. United States, 273 U.S. 583, 586 (1927) (noting the "invited error" doctrine).

Given the enormous complexity of this matter, see App. 565:4-8 (bankruptcy court noting that the Buffalo's bankruptcy proceedings were some of the most "complicated" the court had ever seen), the amount of money at stake, the fact that earlier objections and upset bids had been lodged in the bankruptcy case, and the trustee's continued desire to seek bankruptcy court approval throughout the duration of the matter, the bankruptcy court properly exercised its discretion by ordering the alternative sale procedure after receiving unsolicited bids from entities such as First South Investments, and by requiring court approval for the final disposition of Buffalo's assets.

Because the "bankruptcy approval" argument was never raised or addressed below, and has no application to this case in any event, the Fourth Circuit did not consider, much less decide, "an important federal question" or "an important question of federal law" relating to certain bankruptcy provisions that has been preserved for this Court's review. S. Ct. R. 10(a), (c). Accordingly, the Court should reject Petitioner's ill-conceived "bankruptcy approval" argument as completely irrelevant to the issues raised in this case, and as entirely contradicted by the evidence in the record.

II. THIS CASE IS A POOR VEHICLE FOR CERTIORARI.

This case is a poor vehicle for certiorari for at least two reasons. *First*, none of Petitioner's criticisms of the decision below undermines the merits of the Fourth Circuit's holding. *Second*, even if the Fourth Circuit had erred in its application of legal rules (and it did not), this would still not be a "compelling reason" for certiorari review.

A. THE DECISION BELOW IS CORRECT ON THE MERITS.

None of Petitioners' criticisms undermines the merits of the holding below.

First, as the court of appeals correctly noted, Petitioner's tortious interference, legal malpractice, and breach of fiduciary duty claims share the same element of causation. (Pet. App. 6a-7a.) The sole issue presented in this diversity case is whether, under West Virginia law, a reasonable jury could conclude that a causal link existed between Bowles Rice's conduct and Petitioner's failure to obtain the KY wells. The lower courts simply applied a "but for" analysis to Petitioner's claims, and concluded there was no causal connection between the Respondents' conflict of interest and Petitioner's claimed damages.

Petitioner contends that Elk River's objection caused Petitioner to lose in the bidding for the KY wells. (Pet. 20, 29 ("The District Court ignored that but for ELK RIVER's objection . . . the sale of

BUFFALO's Kentucky assets would have gone forward.") (typeface in original).) In short, Petitioner claims that "[s]ince the 'alternative bid procedure' was never even proposed until more than a month after ELK RIVER objected to its own contract, the sole cause of the alternative bid proposal was ELK RIVER's objection to its own contract." (Pet. 31 (emphasis omitted).) As the Fourth Circuit correctly noted, however, "[t]he record . . . does not bear this out." (Pet. App. 8a.)

What Petitioner ignores is that Buffalo's bankruptcy estate consisted of more than just the KY wells; it consisted of the WV wells too. And when entities made bids for the WV wells – and when the trustee moved the court to approve the sale of those wells – Buffalo's creditors were given the right to object or submit upset bids. On May 3, 2006, the trustee moved for the bankruptcy court to approve a proposed contract to sell the WV wells to AMC for $400,000. On May 23, 2006, two of Buffalo's creditors, Perry and Gillispie, filed separate objections to the proposed sale. (Pet. App. 3a.) EOG had also submitted an upset bid. All of these facts occurred well *before* June 12, 2006, the day that Elk River objected to its own contract for the purchase of the KY wells.

On July 3, 2006, First South submitted a letter of intent to the bankruptcy court offering $2,500,000 for *all* of Buffalo's assets. At the hearing held on July 7, 2006 on the creditors' objections to the proposed WV wells' sale, the creditors informed the bankruptcy court that "at least two entities had expressed interest in acquiring *all* of [Buffalo's]

assets . . . for substantially more than the total of the highest existing bids." (Pet. App. 8a (emphasis added).)

It amounts to nothing more than speculation to assume that the bankruptcy court would have ignored the creditors' objections to the proposed sale of the WV wells, disregarded First South's multi-million dollar offer for all of Buffalo's assets, and approved the sale of the KY wells to Petitioner for a mere $450,000. It made perfect sense for the bankruptcy court to order an auction for Buffalo's assets when faced with higher bids because doing so "creat[ed] the potential for higher returns for Buffalo's creditors." (Pet. App. 9a.) Significantly, the record shows that Elk River's objection had nothing whatsoever to do with the bankruptcy court's decision to order the "alternative sale procedure." The court's order never mentions Elk River at all. Instead, the bankruptcy court properly recognized that various entities "had expressed interest in acquiring all of the assets . . . for substantially more than the total of the highest existing bids for the [assets separately] . . . ." (Pet. App. 20a.) The bankruptcy court simply bundled the KY and WV wells "to fulfill [its] obligation to maximize the bankruptcy estate's recovery." (Pet. App. 18a.)

In the end, the bankruptcy court recognized that alternative sale procedures would obtain a higher price and greater overall benefit for the estate. Its decision to do so garnered $7,000,000 for Buffalo's creditors – fourteen (14) times *more* than Petitioner's $455,000 upset bid. As the Fourth

Circuit correctly concluded, Petitioner's "unsupported assertion that, but for Elk River's objection, the bankruptcy court would have approved the upset bid before having an opportunity to restructure the bidding process is not sufficient to defeat [Respondents'] summary judgment motion." (Pet. App. 9a-10a.)

B. ALTERNATIVELY, CERTIORARI REVIEW IS NOT WARRANTED FOR THE "MISSAPLICATION OF A PROPERLY STATED RULE OF LAW."

Even if there were any validity to Petitioner's quibbles with the merits of the Fourth Circuit's holding (and there is not), Petitioner would still face a significant hurdle in this Court's traditional reluctance to grant certiorari review of "the misapplication of a properly stated rule of law." S. Ct. R. 10; see also Youngblood v. West Virginia, 547 U.S. 867, 873 (2006) (Scalia, J., dissenting) ("Even when we suspect error, we may have many reasons not to grant certiorari outright," including "an overcrowded docket, a reluctance to correct 'the misapplication of a properly stated rule of law,'" and "this Court's Rule 10."); Gonzalez v. Crosby, 545 U.S. 524, 544 n.7 (2005) (Stevens, J., dissenting) ("[E]rror correction is a disfavored basis for granting [certiorari] review . . . ."). This diversity case has never involved an interpretation of the Constitution or revolved around any other important federal question. It does not raise legal questions of extraordinary significance. In fact, as the lower courts' decisions make crystal clear, resolution of the

instant case has never even depended upon an interpretation of this Court's prior precedents.

As noted above, the district court and the Fourth Circuit applied West Virginia's law of causation to Petitioner's claims. Petitioner never questioned that the traditional "but for" test should apply to its tortious interference, breach of fiduciary duty and legal malpractice claims. Petitioner therefore does not dispute that the rule of law the Fourth Circuit applied was a proper one. Rather, it challenges the *application* of the Fourth Circuit's properly stated rule of law. Although Petitioner may believe that the lower courts misapplied the "but for" rule, this objection (even if valid) does not furnish a compelling reason for certiorari review. "The jurisdiction of the Supreme Court to review cases by way of certiorari was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923). And yet the *only* thing Petitioner seeks here is precisely what Mr. Chief Justice Taft said was forbidden in Magnum Import – another desperate bite at the apple of litigation. The Court should reject Petitioner's request, for "[t]he Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions." Chief Justice Vinson, Work of the Federal Courts, Address before the American Bar Association (Sept. 7, 1949), *in* 69 S. Ct. v, vi (1949).

As a general rule, this Court will not grant certiorari to resolve disputes that turn on the law of a single state. A decision on such a question,

"whether right or wrong, does not have the kind of national significance that is the typical predicate for the exercise of [] certiorari jurisdiction," Leavitt v. Jane L., 518 U.S. 137, 146-47 (1996) (Stevens, J., dissenting), and the Court's custom in such disputes is to "defer to the interpretation of the Court of Appeals for the Circuit in which the State is located," Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004); see also MacGregor v. State Mut. Life Assurance Co., 315 U.S. 280, 281 (1942) (per curiam) ("[W]e shall leave undisturbed the interpretation [of Michigan law concerning insurance] by three circuit judges whose circuit includes Michigan.").

The decision below is unpublished and necessarily confined to this case with little precedential value. As an unpublished decision, it does not apply to anyone other than this Petitioner and these Respondents. The Fourth Circuit's decision neither "establishes, alters, modifies, clarifies, or explains a rule of law," nor "involves a legal issue of continuing public interest." 4th Cir. R. 36(a)(i)-(ii). Such a case, relevant only to the particular private litigants, does not warrant review by this Court. See Nat'l Labor Relations Bd. v. Pittsburgh Steamship Co., 340 U.S. 498, 502 (1951) ("Certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties"); see also Chief Justice Rehnquist, The Supreme Court 234 (2001) ("Another important factor is the perception of one or more justices that the lower-court decision may well be . . . of general importance beyond its effect on these particular litigants.").

In addition, as outlined above, this case presents unique facts and circumstances that make it a particularly poor candidate for review. Petitioner does not contend a conflict exists among the lower courts that this Court should resolve. Petitioner does not even attempt to allege a split of authority. That is because no such split exists. To the contrary, as noted earlier, the Fourth Circuit's unpublished decision conforms to longstanding principles, precedent, and the facts of this case. Taken together, the inherently fact-specific nature of the question presented and the correctness of the lower courts' decisions make this case a particularly unsuitable candidate for further review.

As Supreme Court Rule 10 makes clear, the grant of a petition for certiorari, which is not a matter of right, requires "compelling reasons." In dismissing a writ of certiorari in Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923), Mr. Chief Justice Taft defended the Court's careful consideration of certiorari:

> If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that *it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and*

> *embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.*

(Emphasis added.)

There is no articulated conflict here. This case does not present a critical societal question that is "importan[t] to the public." The reach of the Fourth Circuit's unpublished opinion in this fact-specific case extends no further than to the parties involved. The sum and substance of Petitioner's complaint is a disagreement with the decision of the Fourth Circuit, and indeed with every decision of every court that has heard this case since it originated in the bankruptcy court nearly six years ago.

The Fourth Circuit correctly affirmed the dismissal of Petitioner's speculative lawsuit, and this Court should deny review. The Fourth Circuit's decision is correct on the merits. Additionally, the question presented by this Petition is not of the character described by Rule 10. Not only are there no special or important reasons favoring review in this case, but also, as Mr. Justice Stewart once wrote: "The only remarkable thing about this case is its presence in this Court. For the case involves no more than the application of well-settled principles to a familiar situation, and has little significance except for the [parties]." Butz v. Glover Livestock Commission Co., 411 U.S. 182, 189 (1973) (dissenting opinion). The Court, therefore, should deny the Petition.

CONCLUSION

For all of these reasons, Respondents respectfully request this Court deny the petition for a writ of certiorari.

Respectfully Submitted,

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June 1, 2010

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The United States District Court for
The Western District of Virginia
Re: Denying Plaintiff's Motion for
Reconsideration and Dismissing Complaint
entered October 28, 2009 ..... 1a

[Entered October 28, 2008]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

HINKLE OIL & GAS, INC.,

Plaintiff,

v.

BOWLES RICE MCDAVID
GRAFF & LOVE LLP, JULIA
CHINCHECK, CHARLES DOLLISON,
MARC MONTELEONE, AND
GERARD STOWERS,

Defendants.

Civil Action No.: 7:07CV00487

FINAL ORDER

By: Samuel G. Wilson
United States District Judge

On September 18, 2008, the Court granted defendants' Motion for Summary Judgment as to all pending claims but granted plaintiff leave to file an amended complaint within 10 days asserting any claim that does not require plaintiff to prove that defendants caused its failure to obtain the Kentucky wells. The Court's order noted that if plaintiff failed

to file its amended complaint or if it filed an amended complaint the Court concluded was not in compliance with its order, the Court would *sua sponte* dismiss it and enter judgment for defendants without further notice. Plaintiff has moved for reconsideration and filed an amended complaint. The Court finds nothing in plaintiff's motion for reconsideration warranting reconsideration and concludes that plaintiff's amended complaint raises no claim that does not require plaintiff to prove that defendants caused its failure to obtain the Kentucky wells. Accordingly, it is ORDERED and ADJUDGED as follows:

(1) Plaintiff's motion for reconsideration is DENIED;

(2) Plaintiff's amended complaint is DISMISSED; and

(3) In accordance with the Court's memorandum opinion and order entered on

September 18, 2008, judgment is entered for defendants as to all pending claims.

ENTER: This October 28, 2008.

/s/ [illegible]
UNITED STATES DISTRICT JUDGE

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(3)

No. 09-1319

Supreme Court, U.S.
FILED
JUN 09 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HINKLE OIL & GAS, INCORPORATED, AN OKLAHOMA CORPORATION, PETITIONER,

v.

BOWLES RICE MCDAVID GRAFF & LOVE, LLP, A WEST VIRGINIA LIMITED LIABILITY PARTNERSHIP; CHARLES B. DOLLISON; JULIA A. CHINCHECK; DOES 1 - 100; MARC MONTELEONE; GERARD STOWERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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REPLY TO POINTS RAISED BY RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. PETITIONER TIMELY AND PROPERLY RAISED THE BANKRUPTCY APPROVAL ARGUMENT IN THE COURTS BELOW

Respondents claim that Petitioner did not raise many of its bankruptcy approval arguments in the district court and nothing in the Fourth Circuit's opinion suggests that the court addressed the merits of Petitioner's argument on appeal (Resp.12) and that although "the primary thrust of Petitioner's argument is that certiorari is warranted for this Court to review the applicability of certain bankruptcy code provisions and federal bankruptcy rules ... those provisions were not properly raised and argued by Petitioner in the district court, were nor addressed or analyzed on appeal by the Fourth Circuit, and have no application to the facts of this case in any event" (Resp. 13).

Respondents' claim is erroneous on two counts.

First, the district court and the directly addressed that specific issue (Pet. App. 19a – 20a). Footnote 4 of the district court opinion actually emphasizes that the court was presented with, and did consider, the very question (Pet. App.26-a). The district court chose to traverse the precise point raised by Hinkle: **If there had been an upset bid – and there was – then, absent an objection by Elk River to its own contract, the bankruptcy court would have approved the highest upset bid (after auction) as a matter of course.**

Second, the Fourth Circuit also dealt directly with the issue. The Court of Appeal compounded the district court's error when, completely ignoring the plain language of the Trustee's upset bid notice, the Fourth Circuit said (Pet.App. 5-a), "The upset bid included a proposed purchase agreement that, by its own terms, was subject to the approval of the court." **This statement totally misstates and turns on its head the actual wording of the notice, which is contained at Pet. 4.**

Contrary to Respondents' position, the Fourth Circuit did indeed consider the primary point raised by Petitioner (Pet. App. 7-a), The Fourth Circuit fully recognized Petitioner's point when it stated, at FN 5 (Pet. App. 10a – 11a):

> "Although Hinkle argues that the bankruptcy court's approval was not required, the evidence in the record strongly supports the *inference* that the trustee would not have acted without the court's approval. ... Therefore, *whether or not the approval was legally required* there is absolutely no support for the assumption that the trustee would have reversed course and attempted to finalize the Hinkle sale without the court's approval." (Emphases supplied).

Although Petitioner has demonstrated that the primary issue it argues was, in fact, argued before and analyzed by the lower courts, Petitioner, in the interest of completeness, examines the cases cited by Respondents for the proposition that if a question may not have been directly raised, it may not be considered

by this court. Such an argument misapprehends the law.

In *Singleton v. Wulf*, 428 U.S. 106, 120, 49 L.Ed.2d 826, 96 Sup. Ct. 2868 (1976), for example, while Respondents cites the first sentence of the section correctly, they err by not stating the entire section of the opinion, which reads:

> "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In Hormel v. Helvering, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 83 L.Ed. 1037 (1941), the Court explained that this is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . (and) in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.' We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute. We think he was justified in not presenting those arguments to the Court of Appeals, and in assuming, rather, that he would at least be allowed to answer the complaint, should the Court of Appeals reinstate it."

Respondents likewise cite *United States v. Galletti*, 541 U.S. 114, 120, n.2, 158 L.Ed.2d 279, 124 Sup. Ct. 1548 (2004) for the proposition that Petitioner has forfeited the argument by failing to raise it in the court below. Once again, Respondents err by citing a *portion* of the section without citing the *entire* section, which, in this case, reads:

> "Respondents argue that ... Respondents have forfeited this argument by failing to raise it in the courts below. Indeed, the closest respondents have come to arguing that the state limitations period applies was in the Court of Appeals, when respondents argued that 'under California law, any collections suit filed against a partner to collect a partnership debt is subject to the statute limitation provision which applies to the underlying debt of the partnership.' (Citation to its brief). *This argument, of course, is contrary to respondents' position in this Court.* (Emphasis supplied).

Respondents rely on *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168-169, 160 L.Ed.2d 548, 125 Sup. Ct. 577 (2004). Once again, Respondent should quote the entire paragraph, not a single sentence. That opinion states:

> "We *ordinarily* do not decide in the first instance issues not decided below. (Citation). Although we have deviated from this rule in exceptional circumstances, (Citation), the circumstances here cut *against* resolving the §107 claim. Both the question whether Aviall has waived this claim and

> the underlying §107 question (if it is not waived) may depend in part on the relationship between §§107 and 113. *That relationship is a significant issue in its own right. It is also well beyond the scope of the briefing and, indeed, the question presented, which asks simply whether a private party "may bring an action seeking contribution pursuant to CERCLA Section 113(f)(1)." Pet. for Cert. i. The § 107 claim and the preliminary waiver question merit full consideration by the courts below.* (Emphasis supplied)."

Rather, Petitioner asserts that the Court should rather consider that holding in *United States v. Mendenhall*, 446 U.S. 544, 552, fn. 5, 64 L.Ed.2d 497, 100 Sup. Ct. 1870 (1980):

> "While the Court ordinarily does not consider matters neither raised before nor decided by the courts below (Citation), it has done so in exceptional circumstances. (Citations). We consider the Government's contention that there was no seizure of the respondent in this case, because the contrary assumption, embraced by the trial court and the Court of Appeals, rests on a serious misapprehension of federal constitutional law. And because the determination of the question is essential to the correct disposition of the other issues in the case, we shall treat it as 'fairly comprised' by the questions presented in the petition for certiorari. This Court's Rule 23(1)(c). (Citations). The evidentiary record in the trial court is adequate to permit consideration of the contention. The material facts are not disputed. A major question

> throughout the controversy has been whether the respondent was at any time detained by the DEA agents. Counsel for the respondent has argued that she was arrested while proceeding through the concourse. The trial court and the Court of Appeals characterized the incident as an 'investigatory stop.' But the correctness of the legal characterization of the facts appearing in the record is a matter for this Court to determine. (Citations)."

Thus, Respondents' attempt to raise the "not raised below" argument has no merit when considered in the context of what was presented to both lower courts and, even more, when faced with the stated decision of the lower courts.

II. RESPONDENTS' ARGUMENT THAT "THIS IS A POOR VEHICLE FOR CERTIORARI" HAS NO MERIT.

After trying to convince this Court that the decision of the lower courts is correct on the merits (Resp. Reply 16-19) and that error alone does not warrant certiorari (Resp. Reply 19-21), Respondents raise three novel arguments:

1. This case has never involved an interpretation of the Constitution or revolved around any other important federal question. (Resp. Reply 19).
2. This case not raise legal questions of extraordinary significance. In fact, resolution of the instant case has never even depended

upon an interpretation of this Court's prior precedents. (Resp. Reply 19-20); and

3. The decision below is unpublished and necessarily confined to this case with little precedential value. As an unpublished decision, it does not apply to anyone other than this Petitioner and these Respondents. (This ignores the fact that the district court opinion was indeed a published opinion, 617 F.Supp.2d 447 (W.D. Va., 2008)).

These points have no merit.

A. THE CASE CONCERNS IMPORTANT FEDERAL QUESTIONS.

11 U.S.C. §363(c)(1) allows the Trustee to sell property of the estate in the ordinary course of business without notice or hearing. The two-pronged test for "in the ordinary course of business" is: (1) Would a creditor expect notice and a hearing on the contemplated transaction because of its unusual nature? and (2) Is the contemplated transaction ordinary for the particular type of business concerned?

Buffalo Properties owned 293 oil and gas wells, 274 of them (93.5%) in West Virginia and 19 of them (6.5%) in Kentucky. Whether it would reasonably be expected that a company engaged in oil and gas explorations would sell off 6½% of its wells at any given time is a legitimate question of fact, there will always be times when a business will need extra capital to take advantage of opportunities or to pay bills; Likewise, any business is motivated by the opportunity for profit, and this would mean that if a well could be sold for

more than it took to operate it, profit would be a compelling reason to sell that well.

Selling *a part* (6½ %) of Buffalo's assets would be something that would reasonably be contemplated in the ordinary course of business. Selling *the whole* of its assets would not. Therefore, Petitioner had a *reasonable expectation* that its upset bid, absent an objection by Elk River would successfully lead to a sale in accordance with the notice (Pet. 4).

Respondents are hoisted to their own petard when they state:

> "The high bidder at the auction offered to pay $7,000,000 for all of Buffalo's assets, whereas Petitioner could only muster $500,000 to purchase a portion of Buffalo's properties. Buffalo's trustee garnered $6.5 million *more* for the debtor's assets than Hinkle was able to offer" (Resp. 2-3; 9-10). "In the end [the Bankruptcy Court's decision for alternative sale procedures] garnered $7,000,000 for Buffalo's creditors – fourteen times *more* than Petitioner's $455,000 upset bid" (Resp. 18).

The obvious inference is that Petitioner was trying to "steal" the 19 Kentucky wells for a bargain basement price. But this facially attractive accusation fails utterly when subjected to even a preliminary analysis. $7,000,000 for 293 wells equals $23,891 per well. $23,891 x 19 wells equals $453,925, which is $1,075 *less* than Petitioner's original upset bid and $46,075 *less* than Petitioner's final bid at the alternative proceeding

auction. Thus, the end result was that the estate garnered *less* per well than Petitioner had offered.

The first important federal question here is the interpretation of 11 U.S.C. §363 (c)(1) re what is a sale in the ordinary course of business and what is – and is not – procedurally required in such a sale. (Pet. 19-23).

The second, equally important Federal Question, concerns the necessity for – and the definition of – a "hearing" under 11 U.S.C. §363(b) in the event of a sale "other than in the ordinary course of business." (Pet. 27-28).

It is critically important in light of conflicting Federal authority (Pet 16-28) for this Court to define where the authority of the Trustee to act without the independent consideration of the Bankruptcy Court begins and ends.

B. THIS CASE RAISES LEGAL QUESTIONS OF SUFFICIENTLY SUBSTANTIAL SIGNIFICANCE TO WARRANT CERTIORARI.

Respondents assert, at Resp. 19-20, "[This case] does not raise legal questions of extraordinary significance. In fact, as the lower courts' decisions make crystal clear, resolution of the instant case has never even depended upon an interpretation of this Court's prior precedents."

If we accept Respondent's reasoning, then there would never be a need for a Supreme Court at all because the lower courts could simply rule as they

wished, without the benefit of a "Court of Last Resort" to determine whether the lower courts were correct or incorrect in their opinions.

It is for *this* Court – not the lower courts and not the respondents – to determine whether or not the questions raised by Petitioner here are sufficiently important to merit a review of the lower courts' decisions, and whether or not to allow the lower courts to traverse their boundaries by deciding issues of fact as a matter of law rather than determining whether or not there *are* issues of fact to be determined by the trier of fact.

C. THE GRANT OF CERTIORARI IN THIS CASE WOULD CERTAINLY APPLY TO A FAR GREATER POPULATION THAN THIS PETITIONER AND THESE RESPONDENTS.

With respect, Respondents' final argument, that "As an unpublished decision, [this case has] little precedential value [and] does not apply to anyone other than this Petitioner and these Respondents," (Resp. 21) is patently absurd.

A plethora of significant cases that have become before this Court which involved only one "party" on each side, *e.g.*, *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803); *Dred Scott v. Sandford*, 60 U.S. 393, 15 L.Ed. 691 (1856); Miranda *v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 Sup.Ct. 1602 (1966); *Bush v. Gore*, 531 U.S. 98, 148 L.Ed.2d 388, 121 Sup.Ct. 525.

The most recent of those cases could be framed in the context of Respondent's positioning of the instant case, *i.e.* one of two candidates will emerge as the President of the United States. In the microcosmic view espoused by Respondent, the result of this case would be meaningful to only one man. However, the more realistic macrocosm demonstrated that this decision affected every citizen of the United States and a great number of people far beyond the borders of this nation.

Likewise, in the instant case, the most recent financial meltdown has sharply increased the number of bankruptcies filed by the populace. Debtors, creditors, potential purchasers of assets from the bankrupt estate, and trustees themselves need to know to what extent they can rely on the word of the Trustee, the contract written up by the Trustee, and the respective powers of the Trustee, on the one hand, and the Bankruptcy Court on the other. Strangely, there have been no Supreme Court decisions since the 1968 case of *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 464, 7 L.Ed.2d 458, 82 Sup. Ct. 486 (1962) which delineate the respective roles of the Trustee and the Bankruptcy Court in handling sales of estate assets under the new Bankruptcy Law which went into effect 25 years after that decision.

CONCLUSION

For all of the reasons stated in the original petition and in this reply, the Supreme Court should grant certiorari in this important case.

Respectfully submitted,

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